OCT 27 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 425

FANCHON & MARCO, INC., *Petitioner,*

v.

PARAMOUNT PICTURES, INC., *et al., Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

RUSSELL HARDY,
HENRY SCHAEFER, JR.,
JAMES WALLACE KEMP.

October 1954.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Fanchon & Marco, Inc., prays that a writ of certiorari issue to review the judgment entered in this case on August 11, 1954, by the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the District Court for the Southern District of California.

On April 10, 1953, when this case was pending in the court of appeals, petitioner filed a petition for a writ of certiorari to review the judgment of the district court, without action in the case by the court of appeals, on the theory that the court of appeals had prejudged this case against petitioner by using it as the authority for affirming the judgment in the *Chorak Case,* 196 F. 2d 225, another

similar case in which some of the respondents here were defendants. Certiorari was denied on the former petition on May 25, 1953. (No. 708, 345 U. S. 964.)

OPINION BELOW.

The opinion of the court of appeals is printed in the Appendix, p. 33, and is reported at 215 F. 2d 167. The opinion of the district court is printed in the Appendix, p. 40, at Record, p. 123, and is reported at 100 F. Supp. 84. There are differences between the opinion of the district court printed in the Appendix and Record and the opinion printed in the Federal Reporter, because of changes made in the opinion at the request of counsel for the respondents after the opinion was filed. The reasons for the changes are stated in a letter printed in full in the Appendix, p. 82. This petition is based upon the unchanged opinion printed in the Record.[1]

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[1] The changes include the following:

1. A statement in the opinion in the Record that petitioners were the beneficiaries of an exclusive first run license for Paramount pictures was changed in the reported opinion by deleting the statement that the license was exclusive. (R. 141; 100 F. Supp. 48.)

2. A statement in the opinion in the Record that San Pedro is a distinct municipality, was changed in the reported opinion to a statement that San Pedro is "not" a distinct municipality. (R. 144; 100 F. Supp. 55.)

3. A statement in the opinion in the Record that Santa Monica is more a part of Ocean Park than of Los Angeles, was changed in the reported opinion to state that Ocean Park and Santa Monica are equally distinct from Los Angeles. (R. 145; 100 F. Supp. 95.)

4. A statement in the opinion in the Record that theatres located in separately incorporated places contiguous to Los Angeles do not compete with those in the Los Angeles metropolitan areas, was changed to state that those theatres are not as competitive with theatres in the metropolitan areas as are theatres located elsewhere. A change from the idea of no competition to relative competition. (R. 145; 100 F. Supp. 95.)

5. A statement in the opinion in the Record that there are differences among the localities in the Los Angeles area which warrant the exclusion from first run of theatres in some of the locali-

JURISDICTION OF THE SUPREME COURT.

The date and time of entry of the judgment to be reviewed was August 11, 1954.

The statutory provisions believed to confer on the Supreme Court jurisdiction to review the judgment, are sections 1254 and 2101 of the Judicial Code (62 Stat. 928, 962; 63 Stat. 104; 28 U. S. C. A. sec. 1254).

QUESTIONS PRESENTED FOR REVIEW.

1. In a private suit for treble damages under the antitrust laws, in which judgments in *United States* v. *Paramount*, 334 U. S. 131, have been received by the court as establishing all of the facts in the government case, may the district court correctly determine that the facts thus shown are of no evidentiary effect in the private suit, because of a supposed presumption that the conspiracy and monopolization shown by the judgments automatically ceased upon the entry of the judgments, or that those facts are rebutted by such a supposed presumption?

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ties, except in such communities as Inglewood, Belvedere Gardens, Huntington Park and others, was changed in the reported opinion to delete the exceptions. (R. 146, 147; 100 F. Supp. 95.)

6. A statement in the opinion in the Record as to the time when the respondents abandoned certain practices, *i.e.*, "whether we take as the starting point the date of the final decree, June 25, 1948, or the consent decree as to the Paramount defendants, March 3, 1949, or the consent decree as to others, February 5, 1950"—was changed to delete the dates and to attribute the abandonment to the time of "the entry of the consent decrees". (R. 147; 100 F. Supp. 95, 96.)

7. A statement in the opinion in the Record that theatres in "independent areas" are not in competition with theatres in the Los Angeles metropolitan area, was changed in the reported opinion to state that the theatres in the independent areas are not as competitive with the Los Angeles area theatres as are theatres in another area. A change from no competition to relative competition. (R. 151, 152; 100 F. Supp. 97.)

8. A statement in the opinion in the Record that Inglewood "does not theatrically impinge upon urban Los Angeles", was changed in the reported opinion to state that Inglewood "impinges theatrically less upon urban Los Angeles" than upon theatres in the urban area. (R. 157; 100 F. Supp. 99.)

2. May the district court correctly decide that the conspiracy and monopolization so shown by the judgments in the government case, are rebutted in the private suit by general denials made by some of respondents' witnesses, who had neither knowledge of nor participation in the conspiracy, that they personally did not consult or agree with any respondent to refuse to license motion pictures to petitioner.

3. Does a presumption arise against a private litigant that defendants in a government antitrust suit discontinued the conspiracy, monopolization, acts, ownerships and relations constituting the unlawful conduct, upon the entry of judgments against them in the government case.

4. Does such a presumption arise where the practices, acts, ownerships and relations, or a substantial and important part of them, are not required by such judgments to be discontinued until long after the entry of the judgments, and the time for such discontinuance had not expired and would not expire until long after the period when the private litigant suffered the damages of which he complains.

5. Whether it is clearly erroneous for a district court to decide that conspiracy and monopolization have ceased to be the cause of a restraint of trade and monopoly merely upon the entry of such judgments, and that individual non-conspiratorial action has thereupon become the cause of the continuation of the same conduct, ownerships, relationships, refusals and restraints.

6. Whether, where respondents have unanimously and simultaneously refused to deal with petitioner, no recovery can be had unless it is shown that there has been concurrence of conspiracy AND unreasonableness AND injury to petitioner.

STATUTORY PROVISIONS.

Sherman Antitrust Act (26 Stat. 209; 15 USCA, Sections 1, 2, 7)

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 7. Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Clayton Act (38 Stat. 730; 15 U. S. C. A., sections 15, 16, 26)

Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sus-

tained, and the cost of suit, including a reasonable attorney's fee.

Section 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: Provided further, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Section 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted, and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulations, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT OF THE CASE.

At the time to which this case applies, petitioner had been operating two first-run motion picture theatres in Los Angeles for nineteen and twelve years respectively; subject, however, to the many restraints and discriminations described in the *Paramount Case*, 334 U.S. 131. It now operates one first-run theatre. Shortly after the decision of this Court in the *Paramount Case*, petitioner leased and sought to establish a third first-run theatre. This case relates to the efforts of petitioner to get pictures for the third theatre.

The respondents are:

1. Paramount Pictures, Inc.,
2. Paramount Film Distributing Corporation,
3. Loew's Incorporated,
4. RKO Radio Pictures, Inc.,
5. Universal Pictures Company, Inc.,
6. Universal Film Exchanges, Inc.,
7. United Artists Corporation,
8. Twentieth Century-Fox Film Corporation,
9. National Theatres Amusement Co., Inc.,
10. Fox West Coast Theatres Corporation.

Paramount, Loew's, RKO and Fox, with Warner Bros. Pictures, Inc., are the so-called five major motion picture distributors. With Universal, United Artists and Columbia Pictures Corporation, they control eighty percent or more of the feature motion pictures used by motion picture theatres in the United States.

National Theatres and Fox West Coast Theatres is the second largest combination of theatres and the second largest licensee of motion pictures in the United States. When this case was tried it operated 709 theatres throughout the country, of which from 160 to 250 were located in the Los Angeles area. (Ex. 42, R. 127, 1207, 1341, 1380, 1382, 1535, 1536, 2058, 2088; *United States* v. *Paramount*, 334 U. S. 131, 150, 167.)

Petitioner leased the Baldwin Theatre—the newest, most modern, beautiful, spacious and comfortable motion picture theatre in Los Angeles, located nearer to the center of the area population than any other theatre, and quickly and easily accessible to people from all parts of Los Angeles and nearby places. (R. 1550, 1555, 1556, 1863, 2443, 2444, 2910, 2985.) Prior to the opening of the theatre in August 1949, petitioner made requests of each and all of the eight picture distributors, including respondents, to license feature pictures for first run use with which to open and operate the theatre. (R. 135.) All refused. From time to time thereafter until shortly before the trial of this case in 1951, petitioner continued its efforts to procure pictures from the distributors for first run use in the theatre. Every request was denied. The distributors also unanimously refused to license pictures for the theatre except for second run exhibition, subject to a clearance of twenty-one days in favor of the first run exhibitors in the Los Angeles area.

On May 8, 1950, petitioner filed suit against respondents in the District Court at Los Angeles, and complained that the refusals were pursuant to conspiracy and monopoly in violation of the antitrust laws, and sought an injunction against the refusals and damages resulting from the past deprivation. (R. 3.) After a trial without a jury, the complaint was dismissed by judgment entered November 1, 1951. (R. 201-202.)

Five final judgments entered against the defendants in that case, were introduced by petitioner as *prima facie* evidence in support of its complaint, under section 5 of the Clayton Act. The judgments were as follows:

1. A judgment against all respondents, dated December 31, 1946. (Ex. 41, R. 1641; printed also in 70 F. Supp. 72.)

2. A final judgment against the RKO defendants in the government suit, dated November 8, 1948. (Ex. 45, R. 1621.)

3. A final judgment against the Paramount defendants, dated March 3, 1949. (Ex. 46, R. 1621.)

4. A final judgment against Universal Pictures Company, Inc., and Universal Film Exchanges, Inc., dated February 8, 1950. (Ex. 49, R. 1621.)

5. A final judgment against Loew's, dated February 8, 1950. (Ex. 48, R. 1541-1542, 1621.)

The district judge in this case also received in evidence, as showing more fully the matters adjudicated in the government case, the findings of fact in that case, dated February 3, 1947, and February 8, 1950, as well as the opinion of this Court. (Exs. 41, 42, 43, 44, 47, R. 1536, 1538, 1621; 70 F. Supp. 53; 334 U. S. 131.)

The district judge received the judgments as evidence, without limitation, of all the matters in the government case.

The judgments, supplemented by the findings, etc. showed that respondents had by conspiracy developed and enforced a fixed and uniform system of runs, clearances and admission prices for the theatres to which they licensed their films on a nation-wide scale, principally in the large metropolitan areas. Specific reference to the situation in this regard in Los Angeles was made in the judgments and findings. (Ex. 47, finding 85.) They also specifically stated that exhibitors like petitioner, when attempting to bargain with respondents for pictures, were met by a fixed scale of clearances, runs and admission prices to which they were obliged to conform; that the system of runs and clearances was designed to protect the theatres of respondents, safeguard their revenue therefrom, and eliminate competition; that the system gave respondents a practical control over the run and clearance status of any theatre, and involved discrimination against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by

building or improving theatres; and that the purpose and effect of the system was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but solely upon the basis of whether it was operated by one of the respondents. (Ex. 47, findings 79-85(a), 140; Ex. 45 and 46, paragraph 9, R. 3421.)

The same system of fixed runs, clearances and admission prices described in the findings in the government case, as shown by other evidence in this case, was being enforced by the respondents in Los Angeles during the period laid in the complaint in this case. In that system, three clearances, *i.e.*, the time elapsing between successive runs, applied to the first run—7, 14 and 21 days. Except as to the theatres of respondent Fox West Coast Theatres, once a theatre in the Los Angeles area was assigned to a particular run and clearance, it received pictures from none of the picture companies on any better basis, and seldom on any other basis. By this conspiratorial process of classification petitioner's Baldwin theatre was refused first run pictures and was relegated to a second run with 21 days clearance. (R. 614-615, 619, 621, 622, 628, 630-631, 634, 648, 687, 695, 1512, 1781, 2455, 2462-2464, 2823, 3149, 3762.)

The judgments in the government case showed the reasons for the refusals. They were *prima facie* evidence of the fact that the respondents had extensive theatre holdings throughout the United States, that in cities with over 100,000 population they controlled at least 70 percent of all first run theatres, and, specifically, that in Los Angeles respondents were most predominantly in control of the first run theatres. (Ex. 47, findings 147(e) 148); that the control of theatres played a vital part in effecting the violations of law; that monopoly power was derived from the theatre control; that there was intent and actual exercise of the monopoly power to exclude competition;

that the theatre control, called vertical integration, was a means of carrying out and powerfully aided the conspiracy to fix runs, clearances and admission prices; and that the predominant position of respondents in first run theatres was strongly protected by the system of runs and clearances. (Ex. 47, findings 43(a), 85, 147(a)(b)(d), 148(e)(f)(g).)

During the period of the government case and continuing during the period laid in the complaint in this case, the same control by respondents of the first-run theatres in Los Angeles existed and the district judge in this case so found the fact to be. Ex. 47, findings 3(c), 3(f), 13-17, 24, 32, 38, 39, 40-43; R. 175-176, 177-178, 182-184, 768-769, 1218, 1219, 1220, 1222, 1234, 1235, 1247, 1377-1378, 1899, 1952, 1953, 2061, 2094, 3106, 3108, 3109, 3443, 3444, 3527, 3535.) There was one apparent exception: in 1949 some of the theatres were transferred to a new corporation controlled by three brothers, who were also principal officials of respondents Twentieth Century-Fox Film and Fox West Coast Theatres. But no change was made in the limitation of first run pictures previously enjoyed by these theatres. (R. 1375, 1676, 1899, 3193.)

The findings of the district court in the government case are to the effect that no relief from the monopoly exclusion and restriction of independent exhibitors, like petitioner, could exist until respondents' control of theatres should be terminated.

> Effective relief from the monopoly power of and its exercise by the major defendants cannot be obtained without divorcement. No adequate competition among the defendants or between defendants and independents can exist in the presence of interdependency among the defendants on the one hand to obtain pictures for their own theatres and on the other to obtain theatre outlets for their own pictures. Divorcement is necessary to prevent the major defendants from being in a state of interdependence which too

> greatly restricts competition. Divorcement is a necessary remedy to introduce competition into defendants' system of fixed admission prices, clearances and runs, and to remove a major incentive to discriminatory trade practices. (Ex. 47, finding 156(b).)

For the reasons thus stated the judgments received in evidence in this case required divorcement of the theatres by respondents throughout the country, specifically including the theatres located in the Los Angeles area.

But none of the divorcements of theatres, including those located in Los Angeles, was required to occur, and none had in fact occurred, until at least seven months after the complaint in this case was filed, on May 8, 1950. For instance, the RKO control of theatres, including theatres in Los Angeles, was in existence as recently as January 1, 1951; the Loew's control of theatres in Los Angeles and elsewhere was in existence at least as late as February 1951, the judgment as to Loew's merely providing for the submission of a plan of theatre divestiture not later than that date; and the Warner and Fox divorcements of theatres, including those in Los Angeles, were not required to begin until January 1953, about fifteen months after the close of the trial in this case, on July 30, 1951. ((Ex. 45, R. 175-176; CCH 1950-1951, Trade Cases, paragraphs 62765, 62861; Ex. 48, R. 1541-1542, 1621.) The fact that these divorcements had not occurred is significant in connection with the supposed presumption of nonexistence of conspiracy and monopoly applied by the district judge, referred to *infra*.

The rebuttal evidence presented by respondents consisted almost wholly of the testimony of their local film sales representatives, regularly stationed at Los Angeles. These and other witnesses testified that, as a matter of practice and specifically as to the requests for pictures made by petitioner, all decisions as to granting licenses for first run were not made by them, but by company offi-

cials at the home office in New York City. (R. 722-723, 1467, 1765, 3419, 3476-3478, 3521, 3523, 3537, 3609.) There was no evidence that these Los Angeles sales people had been present and participated in the decisions made in New York. The function of the Los Angeles representatives was merely to transmit to petitioner the denials decided upon in New York. These witnesses, of course, testified voluminously as to a variety of supposed reasons for the denials, but it is clear they had no competent information on the subject. With one exception, no representative from the New York office of any respondent or of the other companies appeared. The exception was the RKO sales manager with headquarters at New York, but he gave no information as to the decisions made in New York against petitioner. (R. 3286.)

The district judge found that the almost perfectly uniform and unanimous action of the distributors, especially in the limitation of first runs to their controlled theatre corporations, and the denials of first run for the Baldwin theatre, was not the result of conspiracy, but the result of each individually reacting in a similar manner to general economic and business requirements, and to similar and identical situations. (R. 140-141, 158, 187, 192, 194.) But the economic and business requirements and similar and identical situations were not specifically found or enumerated in the findings or opinion.

The district judge found also that the method of distributing motion pictures disclosed by the evidence was economically necessary and reasonable, *i.e.*, "Such method of distributing motion pictures is reasonable and economically necessary", and "It is economically necessary and is reasonable for a distributor to limit the number of theatres which are licensed to play Los Angeles area first run". (R. 179-180.) He found, specifically, that the limitation of first runs to the theatres of respondents was "reasonable" in each case (R. 182-185); and that the limitation by Fox of licenses for first run and other pref-

erential use of pictures distributed by it to Fox West Coast Theatres was "reasonable". (R. 188.)

Although the judgments, supplemented by the findings, in the government case, were *prima facie* evidence that the control of theatres by respondents, especially the control of the theatres in the Los Angeles area of respondent Fox West Coast Theatres, was a means of carrying out the conspiracy for fixing runs and clearances and excluding independent operators like petitioner, and although for that reason the divestiture of those theatres had been required, the district judge made precisely the opposite finding in this case, namely,

> Fox West Coast, through subsidiary corporations, owns and operates a large number of theatres in the Los Angeles area, which theatres are licensed pictures for exhibition on various runs, from first run to late subsequent runs. Such ownership and operation of such theatres does not constitute a monopoly or an attempt to monopolize the exhibition of motion pictures in the Los Angeles area on the part of Fox West Coast. (R. 196.)

Throughout the trial, in rulings on evidence and in statements "for the record", to "clarify the issues" and finally in deciding the case, the district judge applied a theory of the antitrust laws which made it impossible for petitioner to prevail, and which would make recovery impossible for any plaintiff in a similar case. This theory was that the refusals to furnish pictures to petitioner were not unlawful unless they were unreasonable.

In the written opinion, the trial judge stated the rule for decision as follows:

> So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into the determination—such as admission price, location of a theatre, its policy

with regard to the showing of double features, gift night and other exploitation methods, the rental terms, the extent to which comparative theatres compete with each other—and (c) that he has been damaged by such action.[1] (R. 132; 100 F. Supp. 89.)

The court of appeals fully affirmed this rule. It said:

> The regulation of distribution was required by the nature of the product and by the economic and social forces prevailing in the particular area. The pattern of licensing used in the industry as a whole and in the Los Angeles area was lawful. It would become illegal only if set up by concert of action AND was unreasonable. (R. 4116; capitals supplied.)

In repeated statements during the trial the trial judge emphasized that the main and only issue in the case was whether the refusals were reasonable. Thus, the judge said: "the question is not whether Fanchon & Marco was denied clearance, and it resulted in loss to them, but whether the denial to them was an unreasonable denial"; "you have to show not merely that they did not give you first run, but that the restriction that they imposed upon you and other theatres as to first run was unreasonable"; "This lawsuit should be tried upon the main issue, first, whether there is unreasonableness. There is only one question involved: Is there reasonableness in refusal to the Baldwin in not giving them a better rating"; "the question of reasonableness or unreasonableness is the crux of the whole controversy"; "in the last analysis, it will have to be shown that what was done was not an unreasonable restriction"; "Whether the observance of certain rules of precedence [in the use of pictures among ex-

[1] In another place in the opinion, the district judge stated the rule as not including unreasonableness: "In order to establish a right to recover, the plaintiff in such action must show (a) a conspiracy to monopolize or restrain interstate commerce, and (b) injury to his business by such acts." (R. 129; 100 F. Supp. 88.) But 75 percent of the text is devoted to a justification based on reasonableness.

hibitors] is unreasonable, that is the only lawsuit before me"; and the question is "what a reasonable run and availability for the Baldwin Theatre would have been in August, 1949". (R. 874, 1023, 1160, 1323, 2303-2304, 2569-2570, 3572-3573.)

These and other excerpts quoted under this heading, though brief, accurately reflect the meaning of the full context from which they are taken. They fall short only in emphasis and detail.

It will be noted that in the written opinion the district judge decided the case on the theory that conspiracy and unreasonableness must concur in the refusals of pictures, that conspiracy is necessary but not sufficient. In statements expounding this theory at the trial the sufficiency of unlawful monopoly was ruled out as well. As to monopoly, the following are typical statements: "it is still a part of your claim to show, not that monopoly existed, not that the La Tijera theatre or the Loyola theatre was given preference over you, but that that was an unreasonable preference"; "Suppose they have 99 percent of the pictures, what good does it do you", "it doesn't make any difference whether they control 99 percent of the product or 70 percent of the product throughout the country"; and "I will admit monopoly. . . . So What? What does that mean?" (R. 1710, 2235-2236, 2238.)

The judge said, and in the trial and decision of the case, applied the view, that monopoly in the motion picture business is necessary, that competition, especially an equality of opportunity among exhibitors to contract for the first run of pictures, which he characterized as "anarchy", would destroy the industry and would wreck everybody in it. (R. 874, 1707-1708.) In addition, he said "This is a selective business, which by its very nature must be selective"; and "I think I said in private because of necessity, this business, by its very nature, is monopolistic . . . you cannot run a theatre without getting the products that these people produce, and that is an important and sig-

nificant fact; it is the control of the product which you have to exhibit, without which you can't exhibit". (R. 1707, 1721.)

According to other statements of the district judge, the matter of reasonableness appertained to a variety of subjects, including the exclusive preference for first runs to the film company theatres, to the refusal of first run to the Baldwin theatre in particular, to the refusals of first run to other theatres, to the clearance, to the rules of precedence in furnishing pictures on successive runs, and to the zoning system. (R. 874, 875, 1022, 1023, 1056, 1160, 1320-1327, 1707-1708, 2235-2236, 2238, 2289, 2331-2332, 2569-2570, 3234.) Under this rule, petitioner could not recover without showing that the exclusive preferences were unreasonable, and that the refusal of first run to the Baldwin, the similar refusals to other theatres, the clearance, and the zoning system, were all unreasonable as well.

The trial judge placed on petitioner the burden of proof of unreasonableness; *i.e.*, "all you have to show is a *prima facie* case on unreasonableness"; "the reasonableness or unreasonableness of the clearance is an element of your cause of action, without which you cannot recover"; and "you cannot recover unless you show they have been unreasonable toward you". (R. 1267, 1327, 2235-2236.)

No description or definition of the scope and content of the test of reasonableness was expressed by the district judge, but from time to time during the trial some of the subjects involved in the determination were enumerated, as the following: the physical appointments of the theatre; the location of the theatre; population; comparison of areas; "the entire pattern, the entire picture"; inequitable practices of petitioner and "many others factors". (R. 1058, 1384, 2331-2332, 2573-2574.)

The trial judge stated that under the issue of reasonableness explanations and justifications of the practices by the defendants were permissible, and opinions and judgment of the defendants as to reasonableness, but not of

petitioner and other exhibitors on the same subject, should be received. (R. 1320-1325; 2287, 3232-3234, 3572.) In one ruling on evidence the judge said relative to reasonableness, "motivation is not material in antitrust cases. The motive may be good or bad." (R. 1023.) In another ruling on the same subject, he said, "the defendants in this case may, in justification of their acts * * * assert that in their opinion this is a reasonable clearance, because you see, implicit in their defense, the *bona fide* and *mala fide* of their intent is material". (R. 1325.)

While, according to this theory, the determination is therefore largely in the hands of the defendants, the district judge said "the courts have left for the determination of the judge and jury in each of these cases as to whether a certain practice was in unreasonable restraint", and reasonableness is the "ultimate fact which I must decide." (R. 2331-2332, 3572-3573.)

In receiving the opinions and judgments of the defendants' witnesses as to reasonableness, the trial judge made a statement "for the record" in which he likened the issue and inquiry of reasonableness in this case to similar inquiries in administrative law, saying "We are in the same position as we are in the realm of administrative law". Hence, as he said, "We [the court] are not to substitute our judgment for the judgment of the distributors, if that is a reasonable one", and that "The question is whether, under the particular circumstances they abuse their discretion in granting the contract or in preferring one contract to another. And the theory of reasonableness in this respect is akin to that." (R. 3232-3233.)

The same analogy is emphasized and confirmed in the written opinion, where it clearly appears that the reasoning on which this case was decided, was that the power of the defendants resulting from conspiracy and monopoly to fix runs and clearances and to select and prefer some exhibitors and to postpone and exclude others in the use of pictures, stands on the same legal footing as an act of Congress or of any other public law making

body, and is valid unless the discriminations against the postponed and excluded exhibitors are arbitrary and unreasonable. (R. 145-146; 100 F. Supp. 95.)

The district judge cited as authority for this theory of "reasonable" conspiracy and monopoly, five cases decided by this Court upholding statutes of New York, Pennsylvania, Oklahoma and Texas, making distinctions between citizens and aliens, between different methods of advertising, between corporations and individuals, etc. (R. 145-146, 169; 100 F. Supp. 95.) The cases are:

Patsone v. *Pennsylvania*, 232 U. S. 144;
People v. *Zimmerman*, 278 U. S. 63;
Bain Peanut Co. v. *Pinson*, 282 U. S. 499;
Skinner v. *Oklahoma*, 316 U. S. 535;
Railway Express v. *New York*, 336 U. S. 106.

The important distinction between these cases and the present case, is the distinction between the valid law making power of the national and state legislatures and the power of a private trade conspiracy or monopoly. In one case the power is lawful, necessary and exercised by a public agency, subject to constitutional limitations; in the case of private conspiracy and monopoly the power is detrimental to the public and unlawful without regard to the manner in which it is exercised. In applying the principle of such cases to the conspiracy and monopoly power of the defendants, the district judge clearly and erroneously disregarded this difference and attributed to the unlawful conduct of respondents the validity of acts of public law making bodies.

The rule used by the district judge for the decision of this case, requiring the concurrence of conspiracy with unreasonableness, was attributed to the decisions of this Court in the *Standard Oil Case*, 221 U. S. 1;[1] the *Para-*

[1] At one place in the record the Standard Oil antitrust case was confused with "the one that Judge Landis decided". (R. 1710.) The case decided by Judge Landis was under the Elkins Act, 155 F. 305, D. C. Ill. 1907.

mount Case, 334 U. S. 131; and the *Schine Case,* 334 U. S. 110. In a ruling on evidence the district judge said:

> The courts have not told us what the word "unreasonable" means, and the unreasonableness of the restraint was introduced into the Sherman Act by the Supreme Court in the famous Standard Oil Case. Since that time, except as to specific facts, the courts have left for the determination of the judge and jury in each of these cases as to whether a certain practice was in unreasonable restraint of trade. (R. 2331-2332.)

The district judge ruled that under the *Schine case* the court is required to determine whether in the particular case the particular restriction is unreasonable under the circumstances. (R. 1160, 1707-1708, 2331-2332, 2289, 2573-2574.) At an early stage of the trial in this case, as part of a statement "to clarify the issue", and to show that his view of the law was in accordance with decisions of this court, the district judge read aloud to counsel, all but the final paragraph of that part of the written opinion of this Court in the *Schine case* which relates to clearance. (R. 876-881; 334 U. S. 121-124.) It clearly appears that the statements of this Court were confined to non-conspiratorial and non-monopoly clearances, and the final paragraph expressly so stated. The paragraph omitted from the reading, which shows that the district court in this case was wrong as to the status of conspiratorial and monopoly clearances, is as follows:

> As a last resort appellee seeks to sustain these findings on the ground that Schine got at least some of its clearances by refusing to make any deal for the circuit unless its terms were met. But any clearance so obtained, though otherwise reasonable, would be unlawful, for it would be the product of the exercise of monopoly power. It is evident, however, that that was not the theory adopted by the District Court for it did not look to see what clearances had been obtained in that manner. (334 U. S. 124.)

The district judge was also wrong in attributing to this Court any rule or decision in the *Paramount* case, to the effect that unreasonableness must concur with conspiracy to make clearances unlawful. See *United States* v. *Paramount*, 334 U. S. 131, 144-148, where this Court approved the distinction made by the district court in that case between clearance provisions resulting from separate negotiations in free and open competition and those resulting from concerted action, and the statement to the effect that the reasonableness or unreasonableness of a conspiratorial clearance is immaterial. 66 F. Supp. 342-343.

In the written opinion in this case, the district judge also attributed to the decisions of this Court in the *Paramount* and *Schine* cases, the same validity of conspiratorial runs and clearances. Speaking of the method for determining the legality of the system of runs and clearances in this case, he said:

> the criteria to follow were those adopted by the Supreme Court in the Paramount and Schine cases. They require us to determine, in each *instance*, whether a particular run is unreasonable.[1]
>
> [1] In the opinion in 100 F. Supp. 849 "were" is changed to "are".
>
> . . . .
>
> In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of concert of action and are unreasonable. (R. 134-135; 100 F. Supp. 84, 90-91.)

Applying the rule thus attributed to this Court, the district judge found as a fact that the limitation of first run pictures to theatres of respondents was reasonable and held that the refusals to petitioner were also reasonable because the limitation "has been applied uniformly and without discrimination"; that is, that respondents had also consistently refused first runs to every other inde-

pendent exhibitor who applied. (R. 143, 180-187; 100 F. Supp. 94.)

BASIS OF THE JURISDICTION OF THE COURT OF APPEALS AND OF THE DISTRICT COURT.

The jurisdiction of the court of appeals is based on Title 28, section 1291, of the United States Code; 62 Stat. 929; 65 Stat. 726.

The jurisdiction of the District Court is based on Title 28, section 1337, of the United States Code; 62 Stat. 931, granting original jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce against restraints and monopolies."

ARGUMENT.

The decisions of the district court and the court of appeals in this case are in conflict with the opinion of this Court in *United States* v. *Paramount*, 334 U. S. 131. The findings and opinion in this case show that in the Los Angeles area the major picture distributing companies (who were the defendants in the *Paramount* case and are the respondents in this case), as late as the trial of this case in 1951, were continuing to practice the same conspiratorial system of runs, clearances and admission prices and allocation of pictures among the exhibitors, the same control of the first run theatres, the same preferential licensing of first run pictures to those theatres and the same discrimination against independents, which were found by the district court for the southern district of New York and this Court in the *Paramount* case to exist on a nationwide scale, and to be the result of conspiracy and monopolization.

This case and the *Paramount* case do not deal with different but similar conspiracies and monopolizations, but with precisely the same conspiracy and monopolization. The only difference between the two cases is a short interval of time, in that this case is a specific instance of the

actual operation of the same conspiracy to a single independent exhibitor beginning in 1949, shortly after the decision of this Court in the *Paramount* case in May 1949, and before the proceedings in the district court on the mandate of this Court in that case had been concluded. The findings in the *Paramount* case reflect the conditions existing as late as February 1950. Thus, finding 158 states, "The change in status and practices since 1945 revealed by this evidence [submitted after the remand] has been insufficient to warrant a change in the findings and judgment entered herein." (Ex. 47, R. 1512, 1606; *United States* v. *Paramount*, 85 F. Supp. 881, 895-896.) The present case, therefore, represents but another instance of the "proclivity" of respondents for conduct in violation of the antitrust laws referred to by this Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186, and *United States* v. *Paramount*, 334 U. S. 131, 147, 148.

A decision precisely the reverse of that of this Court in the *Paramount* case was reached in this case by the district court (1) by attributing little or no significance to the judgments in the *Paramount* case, although receiving those judgments in evidence ostensibly without any limitation; (2) by using the judgments as the basis of a supposed presumption that the conspiracy and monopolization of which they were evidence, had been discontinued upon the entry of the judgments; (3) by inferring the nonexistence of conspiracy and monopolization from general and partial denials of witnesses who were without knowledge; (4) by inferring that the identical uniformity of action among respondents shown in the *Paramount* case and in this case, was not the result of conspiracy but of individually reacting in the same manner to similar economic and business conditions; (5) by concluding that the general denials and the supposed presumption of discontinuance rebutted the *prima facie* effect of the judgments and all the other evidence in the case; and (6) by holding that petitioner could not recover unless the refusals to furnish

pictures to petitioner were conspiratorial AND unreasonable AND injurious to petitioner.

Although these are questions of law of great importance, the decision was affirmed by the court of appeals on the ground that—

> The appeal relates entirely to questions of fact. The only question of law possibly suggested is the use and effect of the decrees in United States vs. Paramount and allied cases. (R. 4114).

Presumption of Discontinuance of Conspiracy.

The evidentiary effect of the judgments in the *Paramount* case was deemed by the district judge to have been overcome by a supposed presumption that the conspiracy of which they were *prima facie* evidence terminated upon the entry of the judgments. (R. 671-672, 2283-2284, 3072.) The district judge described that supposed presumption as an "inference that a person against whom a decree has been directed has complied with it, on the assumption that people comply with orders of courts. So because of that assumption, therefore, the defendants are entitled, until the case is entirely concluded, that no inference can be drawn of a continuance of facts from their existence then". (R. 677-678, 1597.) Again "That presumption is that a man follows the law, and that if a man has been under the interdiction of a court, the presumption is that he obeyed the interdiction". (R. 2284.)

> I remind you that you are not before the court charged by the government with violating the decree, so you do not have to exculpate yourself. I assume you are entitled to the presumption of innocence and fair dealing, and you are entitled to the presumption that you have complied with the decree. (R. 3072.)

Not only has the district court in applying such a presumption taken from petitioner the real evidentiary effect of the judgments that the conspiracy existed, and of the presumption of its continuance, but it has used the judg-

ments as the basis of a contrary presumption. This not only nullifies the purpose of section 5 of the Clayton Act "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich* v. *General Motors*, 340 U. S. 558, 568), but in this case has actually inverted section 5 of the Clayton Act and turned the judgments against petitioner.

There is no presumption that upon the entry of a judgment against defendants in an antitrust case, the defendants thereupon ceased their unlawful conduct.

A conspiracy, once established, is presumed to continue until the contrary is shown.

> *Marino* v. *United States*, 91 F. 2d 691, 695, CA 9, 1937;
> *Coates* v. *United States*, 59 F. 2d 173, 174, CA 9, 1932;
> *Hyde* v. *United States*, 225 U. S. 347.

A presumption is based upon the probability of the existence of the fact presumed. But any such probability in the case of the respondents is refuted by an unbroken continuity of unlawful restraints and monopoly practiced by them for at least the last twenty-five years, evidenced by numerous proceedings under the antitrust laws, instituted by the government in repeated efforts to enforce competitive conditions in the motion picture business, as well as by private parties to recover damages and injunctive relief.

A partial list of these proceedings is as follows:

1. 1928—*United States* v. *Paramount Famous Lasky Corp.*, 282 U. S. 30.
2. 1928—*United States* v. *First National Pictures, Inc.*, 282 U. S. 44.
3. 1928—*United States* v. *Balaban & Katz Corp.*, Equity No. 8854, District Court of the United States, Northern District of Illinois, December 15, 1938.
4. 1929—*United States* v. *Fox Theatres Corp.*, S. D. N. Y. Eq. 51-122; consent decree 1931.

5. 1930—*United States* v. *West Coast Theatres, Inc.*, S. D. Cal., Eq. S-10-C, consent decree 1930.
6. 1932—*United States* v. *Fox West Coast Theatres*, S. D. Cal., Eq. Y-38 H, consent decree 1932.
7. 1936—*United States* v. *Warner Bros. Pictures, Inc.*, S. D. N. Y., Eq. 82, 206, 1936.
8. 1936—*United States* v. *Interstate Circuit, Inc.*, 306 U. S. 208.
9. 1939—*United States* v. *Griffith Amusement Company*, Civil 172, W. D. Okla., 334 U. S. 100.
10. 1939—*United States* v. *Schine Chain Theatres, Inc.*, 334 U. S. 110.
11. 1939—*United States* v. *Crescent Amusement Co.*, 323 U. S. 173.
12. 1940—*United States* v. *Barney Balaban, et al.*, Criminal No. 31230, December 10, 1940, District Court of the United States, Northern District of Illinois.
13. 1948—*United States* v. *Paramount*, 334 U. S. 131.
14. 1950—*Milgram* v. *Loew's*, 192 F. 2d 579.

In 1934 the National Recovery Review Board, referring to respondents, reported that "Monopolistic practices in this [motion picture] industry are bold and aggressive and its small enterprise is cruelly oppressed." (Report of the National Recovery Review Board on the NRA Motion Picture Code, May 4, 1934, Library of Congress.) In 1934, in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186, this Court was moved to notice this "proclivity for unlawful activity" of these respondents. Again, in 1948, in *United States* v. *Paramount*, 334 U. S. 131, 147-148, the Court adverted to the same "proclivity to unlawful conduct."

The presumption of discontinuance applied by the district judge and affirmed by the court of appeals, completely ignored the fact that the "vertical combinations"—the unlawful control of theatres which were found to be inducements and aids to the conspiracy and monopolization—

were by the very terms of the judgments not to be dissolved for a long time to come.

The opinion of the court of appeals contains no reference to this supposed presumption, unless it be included in the statement that "The only question of law possibly suggested is the use and effect of the decrees in *United States* v. *Paramount* and allied cases. The weight and effect thereof were for the trial court." (R. 4114.)

General Denials.

In its opinion, the district court stated: "It was the positive testimony of the sales representatives of all the defendants that other producers or exhibitors were not consulted" (R. 153), and "Inference from similarity loses its importance when met by positive denials of such action." (R. 135.) The opinion of the court of appeals contains no reference to the subject. The denials referred to were, in reality, of no value whatsoever. As few as five film companies controlled the exhibition business in Los Angeles, especially the "cream" first run business—Fox, Loew's, Warner, RKO and Paramount. This concentration made concerted action far from difficult. As few as five men in New York could, and undoubtedly did, determine to whom pictures should be furnished in Los Angeles, and upon what basis as to run, availability and otherwise. Respondents' Los Angeles sales employees testified that decisions as to licensing pictures were not made by them, but by company officials at the home offices in New York City, none of whom appeared at the trial. (R. 175-176, 720-723, 1467, 1498, 1765, 3416, 3419, 3461, 3475-3478, 3521, 3523, 3537, 3609.)

Denials of concerted action or consultation were not made by representatives of "all" of the respondents. The only denials recorded in the testimony, are those of the Fox Sales manager, and of the Los Angeles branch managers of Columbia and Paramount. They denied merely that they, personally, had any discussion or talk with any

other company in determining the 21 days availability for pictures to which the Baldwin theatre was relegated. (R. 2866, 3617, 3467, 3468.)

The men who made the denials were, as to licensing pictures, hardly more than glorified correspondence clerks. Their functions were almost wholly confined to the receipt of requests for pictures from exhibitors, the transmission of the requests to the New York offices of respondents; the relaying of the denials to the disappointed exhibitors; the storage, delivery and return of the films; and possibly also the collection of the film rentals from exhibitors.

Denials of concerted action by local sales employees and the absence from the trial of the real actors, of those who had authority to make decisions and were in a position to know, has been the regular procedure of respondents in similar cases. Of that procedure, in *Interstate Circuit* v. *United States*, 306 U. S. 208, 225-226, 1939, this Court said:

> When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.
>
> *Milgram* v. *Loew's*, 192 F. 2d 579, 584, CA 3, 1951.

In *Local 167* v. *United States*, 291 U. S. 293, 298, 1934, the Court said of similar silence by alleged conspirators:

> They were present in court but failed to testify in their own defense. It justly may be inferred that they

were unable to show that they had abandoned the conspiracy and did not intend further to participate in it. Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges brought against them.

In accepting general denials of conspiracy and in applying a supposed presumption of cessation of conspiracy upon the entry of the judgments in the government case, as full rebuttal of the *prima facie* effect of the judgments, the district court has decided, in effect, that the mere formality of receiving the judgments fully satisfies the requirements of section 5 of the Clayton Act. This, of course, vitiates the remedial purpose of the statute.

Concurrence of Conspiracy and Unreasonableness and Injury as the Rule of Decision.

A conspiracy to refuse to license pictures to petitioner for first run use in the Baldwin theatre is unlawful in and of itself, and the reasonableness of the conspiratorial refusal on the ground of necessity or on so-called economic and business grounds, is immaterial.

United States v. *Paramount*, 334 U. S. 131.
United States v. *Schine*, 334 U. S. 110.
United States v. *Columbia Steel Co.*, 334 U. S. 495, 522.
Bigelow v. *RKO*, 327 U. S. 251.
Associated Press v. *United States*, 326 U. S. 1, 11.
Fashion Originators' Guild v. *FTC*, 312 U. S. 457, 461, 467-468.

The district judge in this case said:

> No cases exist which hold that the system, in itself, is a violation of antitrust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preferences. (R. 132.)

No instance of the affirmance by this Court of any theory of reasonableness like that applied in this case by the dis-

trict judge and affirmed by the court of appeals, can be found by petitioner. That theory is not the "rule of reason" stated in the Standard Oil and other cases, but is a rule of decision that is controlled by no objective standard; which accepts as valid the existence and power of conspiracy and monopolization, and the restraints and discriminations actually imposed; and which makes the concerted practices unlawful, and only if they are unreasonable in the personal opinion of the judge and jury in each case. Moreover, according to the district judge, no determination of unreasonableness may be made which is contrary to the opinions and judgment of the defendants on the subject, unless the defendants have abused their discretion in the practices and restraints.

Such a rule of decision necessarily turns upon the variant economic and social views of individual judges, and a judge who would not have voted for the antitrust laws, would find no restraint unreasonable. At the trial of this case, the district judge seriously expressed the view that the "antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern industrial system", and that "of necessity, this business, by its very nature, is monopolistic". (R. 1721, 3978.) It is hard to believe that in the decision of this case these views have not had controlling effect. Apart from this case, however, petitioner intends neither criticism nor approval of such views.

Individual Action v. Conspiracy and Monopoly.

It was undisputed that, prior to the entry of the judgments in the *Paramount* case, in the exhibition business at Los Angeles there was and long had been an almost complete limitation of the first run business to respondents; that there was a system of runs, clearances and fixed admission prices for the use of pictures, in which practically every theatre was classified in a fixed position as to run

and clearance, and in which in every instance respondents were given the valuable and preferential positions; and that the first run limitation, the system of runs, clearances, and admission prices, had been effected by unanimous refusals of respondents to license pictures on any other basis.

It was undisputed that the same condition existed after the entry of the judgments in the *Paramount* case—the dates thereof being November 8, 1948, March 3, 1949, February 8, 1950, January 4, 1951, and June 7, 1951;— and that the unlawful holdings of theatres, found to be the fundamental inducements, aids and incentives to the conspiracy and monopoly, were not required to be dissolved until two and five years after the judgments—some not until as late as 1955.

The same admission price fixing was also still being effectually practiced, with only a slight change in the method. Whereas prior to the decision of this Court in the *Paramount Case,* the prices were named in the film contracts, after that decision the same system was enforced indirectly by refusals to furnish pictures to exhibitors who failed to charge the prices desired by the respondents. (R. 703-704, 723, 724, 728, 730-738, 760-763, 2410-2411, 2708-2709, 2719.) This strong evidence of the continuation and existence of the conspiracy and monopolization was wholly dismissed by the district judge and the court of appeals, with the statement that this is not a price fixing case. (100 F. Supp. 84; 215 F. 2d 167, 169-170.)

While it was undisputed that the cause of the restraint, prior to the judgments, was conspiracy and monopoly, the trial judge found that the cause after the judgments, was "the result of each distributor defendant individually meeting, on economic and other reasonable grounds, similar situations in a similar manner." (R. 148, 187-188.)

That conspiracy should thus automatically and instantaneously cease to be the cause upon the entry of the judgments, and that individual action should immediately

supplant conspiracy and begin and continue to be the cause of precisely the same result thereafter, is incredible!

CONCLUSION.

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

RUSSELL HARDY,
HENRY SCHAEFER, JR.,
JAMES WALLACE KEMP.

October 1954.

APPENDIX

Opinion of the Court of Appeals. 215 F. 2d 167; R. 4112.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,308—Aug. 11, 1954

FANCHON & MARCO, INC., *Appellant,*

vs.

PARAMOUNT PICTURES, INC., *et al., Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Before: ORR, LEMMON and FEE, *Circuit Judges.*

JAMES ALGER FEE, *Circuit Judge:*

This is an action under the Anti-Trust Act by a corporation which owns and operates motion picture theatres in Los Angeles and elsewhere against distributors of motion pictures and other theatre owners and operators. It is claimed there is a combination of defendants, who control eighty per cent of the supply and have a monopoly of distribution, to refuse discriminatorily to release motion pictures to the Baldwin Theatre, operated by plaintiff on the outskirts of the metropolitan core, on first run day and date with theatres in downtown Los Angeles and to confine that house to a twenty-one day clearance in favor of the first run theatres, denying it a seven day or fourteen day basis. The action is not based on price fixing, but is concerned exclusively with runs and clearances. The Trial Judge found against plaintiff and dismissed the action.

The lengthy record and exhibits introduced have been carefully considered by this Court. Based upon this examination of the record ruled upon by an able and experienced Trial Judge, Hon. Leon Yankwich, who heard the case without a jury and who is well acquainted with the local distribution of motion pictures and operation of theatres in the Los Angeles area, the judgment must be affirmed.

During the course of the trial, the Judge carefully defined the issues of fact. A reading of the record indicates a crystallization of issues as exact as if there had been a definitive pre-trial order. Upon the issues so developed, the Trial Judge ruled *seriatim*.

The elaborate findings of fact have been reviewed, and there is no one of them which is clearly erroneous. Indeed, on the record, the Court confirms all the findings.

The essence of the findings is that defendants have not contracted, combined or conspired among themselves or with any motion picture producing or distributing companies, with Fox West Coast or with anyone else, in violation of the Act or as charged in the complaint. It is found that, in all determinations and action affecting appellant or the Baldwin Theatre, each distributor acted in accordance with its individual judgment. It is found that, in licensing first runs in the Los Angeles area, each acted individually in accordance with its own judgment, taking into consideration the general economic and business requirements of the distribution of motion pictures and special conditions affecting the particular distributor. It is found that the general pattern of negotiating licenses for exhibition in theatres with clearances to protect first runs is based upon the location of the theatre being considered, whether in more or less competitive municipalities on the perimeter of urban Los Angeles or in urban Los Angeles itself. It is found that the refusal of a first run to the Baldwin and its licensing on a twenty-one day availability was not the result of any concert, combination, conspiracy or agreement on the part of defendants or of any purpose to favor Fox West Coast, but was the result of each distributor for himself determining the business and economic grounds. It is found that, although the result may have been the refusal of a different basis to Baldwin, this was not due to concert of action among defendants.

The appellant sets out in its brief before this Court the ground of appeal as follows:

"SPECIFICATIONS OF ERROR

"The Trial Court erred in finding and concluding, as a matter of fact and of law, that the unanimous refusals of appellees to license pictures to appellant for first run use at the Baldwin Theatre, or for second run use on 7 days availability, or on 14 days availability, were not in pursuance of conspiracy and monopolization, but were the individual acts of appellees."

An examination of the specifications themselves indicates that this statement is representative as to the points raised. The errors specified are general, and there is no indication that the findings are clearly erroneous by virtue of a special situation such as a drive-in theatre.[1]

The appeal relates entirely to questions of fact.

The only question of law possibly suggested is the use and effect of the decrees in *United States* vs. *Paramount* and allied cases.[2] The weight and effect thereof were for the trial court. The main complaint[3] of appellant is that the Trial Judge did not give the findings and judgments

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[1] *Milgram* vs. *Loew's, Inc.*, 3 Cir., 192 F. 2d 579. In that case, the trial court found conspiracy on the facts, and the appellate court affirmed. However, see dissenting opinion by Hastie, C. J., pages 587-595.

[2] The decrees in evidence are as follows: *United States* vs. *Paramount Theatres Corporation, et al.*, decree, December 31, 1946; findings of fact, conclusions of law and decree, June 11, 1946; decree, March 31, 1948; decree, May 3, 1948 (reversed in part, affirmed in part and remanded to the statutory court by the Supreme Court of the United States, 334 U. S. 131). *United States* vs. *RKO*, consent decree, November 8, 1948. *United States* vs. *Paramount*, consent decree, March 31, 1949. Orders severing and terminating the litigation were entered as to Paramount April 21, 1949, and as to RKO January 18, 1950. On February 8, 1950, the statutory court in *United States* vs. *Paramount* (Paramount being no longer a party) entered a decree against Loew's, Warner's and Fox, and a decree against Columbia, Universal and United Artists.

[3] On the basis of some clerical slips as to figures and dates in the opinion of the trial court, appellant also complains that some of the decrees in evidence as exhibits were not considered. The contention has no merit, since the dating on the exhibits themselves in evidence is confused.

an effect which would result in findings of discrimination against appellant. It is here contended that these decrees were "conclusive" or "almost conclusive." A conclusive presumption is a rule of law. No rule of law required appellees to give Baldwin a preferred position irrespective of conditions at the time of filing of this case. The effect given the judgment by law is extremely limited. The trial court clearly stated the rule of the statute[4] and gave these decrees and judgments the effect of *prima facie* evidence in favor of appellant as though it had been a party thereto, but properly found under the evidence as a whole that the presumption was rebutted and that appellees were not at the time conspiring to discriminate against the Baldwin or appellant.

Appellant contends there is no question as to credibility of a judgment as against witnesses. This is true. Nor can there be any contradiction of the effect to be given to the judgment, as that is fixed by statute. On the other hand, the weight of the judgment, if given full legal effect when balanced with changed conditions and present trade practices, may be very slight. For it must be remembered the decrees in above cases related to a combination to fix prices, runs and clearances, whereas all agree the present case is not based upon any claim of price fixing.[5] The basic *Paramount* case indeed had its major emphasis upon price fixing. The findings upon which that decree was

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[4] *Fanchon & Marco* vs. *Paramount Pictures, Inc.*, 100 F. Supp. 84, 88.

[5] There is no charge here of a conspiracy to fix prices. The trial court so recites in the opinion on file. No allegation of an attempt to fix prices is made in the complaint. And, in response to questions from the Court on oral argument, counsel for appellant admitted this is not a case based upon price fixing. The question as to whether there was a conspiracy was fully considered upon the basis laid in the trial court by the complaint and other proceedings. The findings on this point were positive. This distinguishes *J. J. Theatres* vs. *Twentieth Century-Fox Film Corporation*, 2 Cir., 212 F. 2d 840, where the question of conspiracy to deprive the theatre of preferred position was withdrawn from the jury.

based indicated that runs and clearances were systematized. There were, it is admitted, no injunctions or prohibitions against the continuance of this system. It would seem the gravamen of the concert of action found in that and related cases was price fixing and a series of other controls. However, the trial court found the other proscribed practices have been abandoned.

> "Whatever may have been the practice of the defendants before the decree of the statutory court, it is quite evident that * * * there has been an abandonment of the condemned distributing policies, such as 'zoning,' 'block-booking,' 'key' deals, and the like, a revision of clearances and the establishment of a picture-by-picture exploitation."[6]

Notwithstanding, there is a distinct tendency in the oral presentation and briefs of appellant here to slant the argument as though price-fixing were the key to this case and to go outside the record in referring to documents and other factors. This is improper. The case should be tried on the same basis and theory in this Court as in the District Court.

The District Court found the systems of runs and clearances not in itself illegal. Also, it found that vertical and horizontal combinations are not in themselves illegal. The regulation of distribution was required by the nature of the product and by the economic and social forces prevailing in the particular area. The pattern of licensing used in the industry as a whole and in the Los Angeles area was lawful. It would become illegal only if set up by concert of action and was unreasonable. In this case the record showed parallel action by various appellees in distribution, but the methods used were the choice of the individual distributors, and were not dictated by a conspiracy. The Court found that such action was reasonable toward appellant.

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[6] 100 F. Supp. 84, 95.

"No parallelism, conscious or unconscious, can overcome a finding of reasonableness."[7]

The impression gathered from the whole of the record is that of a highly competitive industry, in which the managers of appellant took an active part and indeed profited from some of the situations of which they now complain. It was only when appellant found the same conditions operated against it as well as in its favor and when its vociferous demands that economic law be repealed in its favor were disregarded, that suit was commenced.

It is said that Fox West Coast Theatres had tremendous buying power, which was used to exclude appellant from the first run market. But this is a highly competitive market, and, if there were actual economic advantages offered to a distributor by one group of prospective purchasers over appellant, there is no reason that the latter can complain. If appellant had built the theatre in the heart of the Mojave, there might have been other economic discriminations of which to complain.

In considering whether there has been unlawful discrimination, the courts hold that an individual distributor not engaged in a conspiracy may consider in determining whether to give a preferential clearance to a particular motion picture house, such as Baldwin, the admission prices charged there, all the factors involved in the location and availability of the particular theatre, the possibility and probability of similar applications by theatres adjacent to that making the application, the competition existing or to be expected with other theatres in the area, the policies followed or to be expected of the applying theatre, since policy of exhibition must ordinarily be consistent, and the policy of the particular distributor as to the use of "showcase" exhibition.

The net result is that this is an appeal solely on questions of fact. Notwithstanding the reversal of some District

[7] 100 F. Supp. 84, 104.

Courts in this field upon the basis of erroneous findings, we do not think the appeal on the facts and the weight of the evidence in this case from an able and experienced judge who had experience in the exact area was justified. Although this Court has reviewed the long and complicated record with extreme care because of the questions of fact so raised, we do not believe an appellate court, already burdened, should have been required to pass on such questions.

Affirmed.

(Endorsed:) Opinion. Filed Aug. 11, 1954.

PAUL P. O'BRIEN,
Clerk.

Opinion of the District Court, 100 F. Supp. 84; R. 123.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 11,573-Y

FANCHON & MARCO, *Plaintiffs*,

vs.

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S INCORPORATED; RKO RADIO PICTURES, INC.; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; NATIONAL THEATRES CORPORATION; NATIONAL THEATRES AMUSEMENT CO., INC.; FOX WEST COAST THEATRES CORPORATION, *Defendants*.

OPINION

After having been filed in the Clerk's office, the opinion of the district court was changed in some important respects in response to requests made by attorneys for the defendants. The opinion printed in this record is the original unchanged opinion. The opinion printed in the Federal Reporter contains the changes—100 F. Supp. 84. The petition for certiorari is based on the unchanged opinion.

APPEARANCES:

For Plaintiff: PACHT, TANNENBAUM & ROSS, BERNARD REICH, ROBERT I. WEIL.

For Defendants Paramount Pictures, Inc., *et al.*: O'MELVENY & MYERS, HOMER I. MITCHELL, PHILIP F. WESTBROOK, JR.

For Defendants Twentieth Century-Fox Film Corporation, *et al.*: NEWLIN, HOLLEY, TACKABURY & JOHNSTON, FRANK R. JOHNSTON, HUDSON B. COX.

[126]

YANKWICH, *District Judge:*

Action for treble damages, instituted by Fanchon & Marco, Inc., a California corporation, with its principal place of business in Los Angeles, California, where it has operated since August 10, 1949, the Baldwin Theatre at 3741 La Brea Boulevard. The Baldwin is a modern building erected prior to August 10, 1949, seats approximately 1800 persons and has adequate private and other parking facilities.

The Complaint alleges that ever since the completion of the Baldwin, the plaintiff has been ready, willing and able to exhibit "the best" motion pictures at the earliest dates, and to operate as a "first-run" motion picture theatre. Upon the ground that the defendants have conspired to deprive the plaintinff of access to such pictures, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act (1 *), treble damages are sought in the sum of $300,000.00, attorney's fees and costs (2).

I.

THE CONSPIRACY CHARGED

Through dismissals, the number of defendants now remaining in the case has been reduced. We identify them briefly:

Paramount Pictures, Inc., a New York corporation, is engaged in producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated companies in various parts of the United States, including Los Angeles and San Diego, California, and in foreign [127] countries.

Paramount Film Distributing Corporation, a Delaware corporation, and a wholly-owned subsidiary of Paramount Pictures, Inc., is engaged in distributing motion pictures in various parts of the United States, including Los Angeles and San Diego California, and in foreign countries.

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* [See Notes to Text—pages 164-171.]

Loew's Inc., a Delaware corporation, is engaged in producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles and San Diego, California, and in foreign countries.

Universal Pictures Company, Inc., a Delaware corporation, prior to May 25, 1943, was a subsidiary controlled by Universal Corporation, which also was a Delaware corporation engaged in producing and distributing motion pictures in various parts of the United States, including Los Angeles and San Diego, California, and in foreign countries. On May 25, 1943 the two corporations were merged under the name of Universal Pictures, Inc.

Universal Film Exchanges, Inc., a wholly-owned subsidiary of Universal Pictures, Inc., or Universal Corporation, is a New York corporation, engaged in distributing motion pictures in various parts of the United States, including Los Angeles and San Diego, California, and in foreign countries.

United Artists Corporation, a Delaware corporation, is engaged in the distribution of motion pictures as above indicated as to other distributing corporations.

Twentieth Century-Fox Film Corporation, a New York corporation, is engaged in producing, distributing and exhibiting [128] motion pictures in the manner indicated as to other corporations.

National Theatres Corporation, a subsidiary controlled by Twentieth Century-Fox Film Corporation, is a Delaware corporation, with a place of business at 1609 West Washington Boulevard, Los Angeles, California, engaged in exhibiting motion pictures, either directly or through associated corporations, in various parts of the United States, and more particularly in several of the Western States, including California, and the cities of Los Angeles and San Diego.

National Theatres Amusement Company, Inc., a Delaware corporation, is engaged in exhibiting motion pictures

in various parts of the United States, and more particularly in several of the Western States, including California and the cities of Los Angeles and San Diego.

Fox West Coast Theatres Corporation, a wholly-owned subsidiary of National Theatres Corporation, is a California corporation, with its principal place of business at 1609 West Washington Boulevard, Los Angeles, California, engaged in exhibiting motion pictures in various parts of the United States, and more particularly in several of the Western States, including California, and the cities of Los Angeles and San Diego.

All the defendants before the court and those against whom the action was dismissed, are engaged in the production and/or distribution of motion pictures.

During the trial, the defendants Fox West Coast Theatres, National Theatres Corporation and National Theatres Amusement Company, Inc., were referred to as Fox West Coast. [129] Directly or through subsidiary corporations, they own, control and are affiliated with some 250 theatres in Los Angeles and vicinity.

The Complaint charges that the defendants for many years past combined and conspired with each other to restrain and monopolize trade and commerce, and have, in effect, unreasonably restrained and monopolized trade and commerce in the production, distribution and exhibition of motion pictures in the United States, including California and the cities of Los Angeles and San Diego and vicinity.

The acts of the defendants by which the plaintiff claims to have been injured in its business are stated in this manner:

(a) Refused to license, sell or furnish motion pictures to the plaintiff for exhibition on a first-run basis, and to permit the plaintiff to compete for such run in open and fair competition with other theatres.

(b) Arbitrarily fixed the run, protection or clearance (the time which elapses between runs of the same picture

in different theatres) of motion pictures in favor of other theatres, including Fox West Coast, and in discrimination against the plaintiff and refusing to permit the plaintiff to compete for play dates in open and fair competition with other theatres or the exhibitor defendants.

(c) Refused to license, sell and furnish motion pictures to the plaintiff on any other basis than for exhibition 21 or more days after they had first been exhibited first-run in Los Angeles. [130]

(d) Refused to permit the plaintiff to compete for such pictures as to all terms of licensing on a picture-by-picture, theatre-by-theatre basis in open and fair competition with other theatres.

(e) Favored Fox West Coast and other exhibitor-defendants and discriminated against the plaintiff with respect to the terms of license of motion pictures, including selection, run and clearance, designation of play dates, rentals, charges, allowances, price, road show engagements, classification of films and other conditions and privileges in connection with exhibition of motion pictures.

It is the plaintiff's claim that these practices have resulted in illegal restraints which have impaired, injured and damaged them, and that the injury and damage would continue as long as the practices continue. For this reason, the plaintiff seeks injunctive relief against the continuance of these illegal acts, in addition to the damages already referred to.

II.

The Treble-Damage Action

Having had occasion very recently to discuss in comprehensive opinions the scope and object of the anti-trust statutes, (3) it will not be necessary to discuss in detail the philosophy behind them, the aim of which is to maintain our economy competitive. There has been much specula-

tion among economists and writers as to whether the type of competition [131] envisaged by the authors of the Sherman Act conforms to the pattern which our industrial development has taken. (4)

The treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute. (5) In order to establish a right to recover, the plaintiff in such action must show a (a) a conspiracy to monopolize or restrain interstate commerce, and (b) injury to his business by such acts. (6) If the prohibited acts which have damaged him have been established in a judgment or decree obtained by the Government in a criminal prosecution or an equity proceeding under the antitrust statutes, the plaintiff may, in aid of his cause, rely upon such judgment or decree, in proving the existence of the prohibited acts. The law specifically provides that such judgment or decree

> "shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." (7)

The Supreme Court has very recently given us an authoritative interpretation of the meaning of this clause. (8) Speaking of the effect to be given to a judgment obtained by the Government in a criminal prosecution, the Court said:

> "To establish their prima facie case it therefore was necessary for petitioners only to introduce, in addition to the [132] criminal judgment, evidence of the impact of the conspiracy on them, such as the cancellation of their franchises and the purpose of General Motors in cancelling them, and evidence of any resulting damages." (9)

The plaintiff in the case before us does not rely solely upon the decree entered in the *Paramount* case. (10) It

offered, in addition, evidence relating to the practices obtaining in motion picture distribution for a long period of time dating back of 1920. In the main, however, so far as the "impact" of these practices on the plaintiff are concerned, they amount to the refusal to license the plaintiff as a first-run motion picture house and to license, sell or furnish pictures to them on any other basis than a 21-day basis. These restrictions concern the basic problem of clearances and runs, which characterizes the manner of distributing motion pictures.

A clearance is a period of time which elapses between the runs of the same feature in a particular area or in specified theatres.

Runs are successive exhibitions of a feature in a given area, first runs being the first exhibitions in that area, the second run being the subsequent one, and so forth, and includes successive exhibitions in different theatres, even though such theatres may be under a common ownership or management. Clearances and runs are related to each other. (11)

The Supreme Court has aptly characterized clearances in one sentence: [133]

> "Clearances are designed to protect a particular run of a film against a subsequent run." (12)

In another case, the Court stated:

> "It is in part designed to protect the value of the license which is granted." (13)

The nature of the product with which motion picture distributors and exhibitors deal is such as to require the regulation of the manner of exhibition. It would be economically unwise, even if feasible, to throw the product on the market on the same day in all the thousands of theatres in the United States, or even in a theatre-going area like Los Angeles. The average minimum number of prints for a feature picture is 280, the maximum is 400. These

must serve 15,000 accounts. For the Los Angeles area, 12 prints are reserved, which number, after the 21-day play-off, is increased to 30. The minimum cost of a print is $165.00.

So preference must be given to certain theatres. And to make such preference effective, the exhibition of pictures at other theatres must be limited to a lapsed period after exhibition of the picture at first-run theatres. Because motion pictures play in units of weeks, the availability period is described in multiples of seven, there being seven, fourteen and twenty-one day periods after first runs elsewhere.

This pattern obtains not only as between different localities, but in theatres located in the same community. And, generally, the rule in the industry has been to license motion [134] pictures upon this basis. No cases exist which hold that the system, in itself, is a violation of anti-trust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preferences. (14)

So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into the determination—such as admission price, location of a theatre, its policy with regard to the showing of double features, gift night and other exploitation methods, the rental terms, the extent to which comparative theatres compete with each other—and (c) that he has been damaged by such action.

As to the manner of proof, the Courts have adopted a liberal attitude, and have permitted inferences of joint action to be drawn from parallel action. (15)

But, regardless of burden of proof, in the last analysis, the trier of facts must be satisfied that the practices which

the plaintiff claims to have injured him were the result of joint action. (16) When this is shown, the measure of damages is the plaintiff's loss, determined either by direct proof of such loss or by proof of what another exhibitor similarly situated made. (17) [135]

III.

The "Staggered" Distribution

All recent actions of this type stem from the decree secured by the Government in its equity action against Paramount. (18) The plaintiff relied in this decree and on two consent decrees against certain defendants who were not parties to the original action.

But, even when there is reliance on the decree for proof of all the facts other than damages, (19) the Court must find, especially where (as here) the claim arose after the decree, that the particular practice continued to the institution of the action, to the damage of the plaintiff.

Supplementing the Findings in the decrees, plaintiffs have gone back many years in an attempt to show that there was, in effect in the Los Angeles area, a zoning system which originated during the days of the N. R. A. Code. And it is their contention that the practices have continued to the present time, that their exclusion from first-run pictures is the result of a conspiracy on the part of the defendants to continue the zoning policy to date and to give preference to the exhibitor-defendants upon conditions of inequality with the plaintiff.

Otherwise said, the plaintiff maintains that certain "favored" theatres, similarly situated, drawing from the same type of audiences, and having similar or even inferior seating capacity and appointments, have been given unjustified preference. [136] So we have to determine whether the practices which the decree in the *Paramount* case condemned, and which the plaintiff sought to prove by evidence *aliunde*, have continued to the present time, whether

they are the result of agreement, and whether the plaintiff has been damaged by them.

IV.

Clearances and Runs

We start with the postulate that an exhibitor does not have the right to compel a motion-picture producer to give him a preferred run. Of necessity, as the motion picture industry could not operate under a system of simultaneous releases, clearances and runs are not illegal *per se*. And the citeria to follow were those adopted by the Supreme Court in the *Paramount* (20) and *Schine* (21) cases. They require us to determine, in each instance, whether a particular run is unreasonable.

In determining the matter after a complete trial, the question of the burden of proof and of inferences from similar actions becomes academic.

In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of concert of action, and are unreasonable. Inference from similarity loses its importance when met by positive denials of such action (22) more, in the realm of commerce, similarity of action, at times, may be the result not of previous agreement, but of solving an identical situation in a similar manner. The facts must be assayed in the light of these principles. [137]

The evidence shows clearly that the producer-defendants make and release the greatest portion of major pictures in the American market. This is evidenced by the following table covering the five-year period 1945-1949.

FEATURES RELEASED BY MAJOR COMPANIES
1945-1949, INCLUSIVE

	1945	1946	1947	1948	1949
Columbia	38	51	49	39	52
M-G-M	31	25	29	24	30
Paramount	23	22	29	25	21
RKO Radio	33	40	36	31	25
20th Cen.-Fox	27	32	27	45	31
United Artists	17	20	26	26	21
Universal	46	42	33	35	29
Warner Bros.-First National	19	20	20	23	25
Total	234	252	249	248	234

A comparative table shows that the pictures released by the majors constitute the largest portion of the pictures released in the United States market during the same five-year period. (23) [138]

Features Released in United States Market
1945-1949, Inclusive

Year	Total Releases	Major Companies	Independent Companies	Major Companies	U. S. Produced	Imported	Independent Companies	U. S. Produced	Imported	U. S. Produced	Major Companies	Independent Companies	Imported	Major Companies	Independent Companies
1949	479	234	245	234	224	10	245	132	113	356	224	132	123	10	113
1948	459	248	211	248	225	23	211	141	70	366	225	141	93	23	70
1947	486	249	237	249	234	15	237	135	103	369	234	135	118	15	103
1946	467	252	215	252	239	13	215	139	76	378	239	139	89	13	76
1945	377	234	143	234	228	6	143	122	21	350	228	122	27	6	21

In the circumstances, some conclusions may be stated as to the "first-run" policy, which is the nub of the controversy.

The first run establishes a picture. The advertising for it is intense over the first-run area. The income from first-run is highest, after which, the law of diminishing returns begins to work. At times, the rental for a subsequent run is less than the cost of a print. The "staggered" release plan helps the exhibitor, who benefits by the prestige established for the picture by the preceding runs. It also enables a larger number of persons to see a picture at a price within their reach, as the later showings are in theatres in the lower price [139] range.

So, on the whole, the plan protects the producer, the exhibitor, as well as the public. Indeed, a system of "free trade," as I called it during the trial—*i.e.*, a system which would enable anyone to bid on the same conditions for a first-run would result in a monopoly for those paying the highest price. And a simultaneous release would result in an anarchy that would destroy both the producer and the exhibitor, even if it were financially possible to print 15,000 prints needed for a successful picture, or 6500 prints for an unsuccessful one. Of course, if the practice were illegal, its economic soundness could not save it from condemnation. But, as the law condemns only the unreasonable application of this and other methods relating to runs and clearances—these considerations have an important place in determining the controversy.

In assaying the policy in practice, certain other factors must be taken into account. Specific theatres in an area may lend themselves to specific treatment. As one of the witnesses testified, class or art pictures, pictures which, by reason of their unusual elements, appeal not to the masses, but to an "artistic elite" as it were—such as the W. Somerset Maugham series ("Trio" and "Quartet"), "Red Shoes," "Kon-Tiki," "Ace In The Hole,"—do better in smaller theatres which have a small overhead, and do a

minimum of advertising. The average peak exploitation period of a picture being fifteen weeks, the topics with which pictures of this character deal being more universal, they "wear" better. Persons interested in them are as likely to [140] patronize the theatre in which they are shown months after their first exhibition as at the premieres. The phenomena is akin to what obtains as to the legitimate stage, where—to mention recent great successes—one is just as delighted now with the simple humanness of Mary Martin's characterization of Nellie Forbush in "South Pacific" or with Claude Rains' great impersonation of Rubashov in "Darkness at Noon," as if one were one of the elect who saw them when the plays were first produced.

When we come, however, to what the same witness called "mass pictures"—pictures designed for mass popular entertainment, their subject is usually topical. They have a contemporary appeal which may not be very durable. And they may do better in certain selected theatres in large metropolitan areas where, through intensive advertising, the use of klieg lights and other devices of showmanship, the interest of the average patron is aroused.

Recent researches indicated that the bulk of the patrons for these mass pictures comes from the youth of the land. Notoriously, the mature groups from the age of 30 on were, even before the rapid development of television, staying away from the motion-picture theatres.

One witness expressed the view that the availability of a larger seating capacity is not very important, because, in the Los Angeles territory, seating capacity has increased too rapidly, and out of proportion with the increase in the number of theatre-goers. Indeed, throughout the year, a theatre would not [141] reach capacity in more than two or three instances.

The choice of medium of distribution also requires that the policy in regard to first-runs be consistent. Unless a producer or distributor follows a consistent policy and

knows that a definite number of first-run outlets exists, he could not send out a steady flow of products. From the standpoint of the theatre owner, also, a sporadic first-run policy would be harmful in the long run. For, unless his patrons knew that the policy followed, whether first-run or other, was general, his own pattern in patronizing the theatre would be disturbed. We are all creatures of habit. If, when we see the advertisement of a picture, we know that, in due time, it will reach our favorite theatre, we are not concerned about runs elsewhere. For we have the assurance that the neighborhood theatre—the theatre we patronize—will, in due time, show the picture. But if the neighborhood theatre should change its policy from time to time or from picture to picture—because the operator might choose to have a variable policy—the pattern for the patrons would be broken. The patrons would have to inquire as to each picture what the policy of the theatre would be. And the result possibly would be that, in their uncertainty, they would move their patronage to other theatres having a more consistent policy. And the theatre would be harmed. Instead of benefitting by the prestige of the picture established by prior runs, the theatre would have to resort to the type of advertising which first-run theatres are engaged in. [142]

So it is quite evident that the first-run policy depends for its success on uniformity. And such uniformity applies not only to run, but also to price charged. For the first-run theatres (in downtown Los Angeles, in Hollywood and in the Wilshire District, which comprise the primary first-run areas in Los Angeles), charging higher prices, could not be expected to participate in an advertising campaign from which some suburban theatre in a newly-developed district, which charges a lower price of admission, would benefit. The producer and distributor must seek outlets in definite areas in Los Angeles, as do most of the defendants in this case, because they present the best opportunity for the uniformity of which we have

spoken. And if all the producer-defendants have fallen into the practice, it is because the situations which confronted them were identical, and the same solution presented itself.

The force and logic of these considerations find support in the fact that the plaintiffs themselves are the beneficiaries of an exclusive first-run license for Paramount productions for their two theatres in Los Angeles, the exclusive features of which were sustained by Judge Harry C. Westover in a case instituted in our court by Paramount Pictures Corporation. (24) The doctrine which prevents one participating in an alleged illegal scheme from questioning its legality does not apply to this type of action. (25) Nor is the case governed by the rule that one who accepts the benefits of an arrangement is not in a [143] position to question it in so far as it may harm him. (26) For we do not believe that the doctrine goes so far as to hold that one who accepts a role in a system of distribution affecting one community is precluded from seeking similar benefits elsewhere. The plaintiff is not questioning the first-run policy in the Los Angeles area. He would merely broaden it to incorporate into it the Baldwin.

Granted that the first-run policy, as limited to downtown Los Angeles, Hollywood and the Wilshire District, benefits the plaintiff, he is not precluded from seeking similar benefits for the Baldwin. However, his participation in the first-run scheme, as applied to the Los Angeles area, may be taken into consideration in determining the reasonableness of the scheme. For it is unlikely that one would willingly take part in a procedure, then attack it as unreasonable when applied to him elsewhere.

The modification of the pattern may, in an indirect way, harm the plaintiff in their exhibition of Paramount Pictures, in their two metropolitan theatres. But, in seeking this result, the plaintiff is not alone. Evidence in the record indicates that during a period of almost two years preceding the institution of this action, beginning late in

December, 1948, before the Baldwin Theatre was actually completed, half a dozen requests for "day-to-date" availability with "first-run" Los Angeles were requested from Paramount by operators of theatres outside the three areas, one such request coming from the plaintiff as owner of the Rio Theatre. Similar requests were made of other defendants. [144]

It follows that, in addition to the factors enumerated, plaintiff's own action speaks for the need for a preferential system of "staggered releases," as one of the witnesses called it. Indeed, when this witness was on the stand, counsel for the plaintiff conceded that they were not attacking the "first-run" system, but sought to have it extended to another area so as to include the Baldwin. The impracticability of simultaneous release has already been adverted to. To this, we add the fact that, even if such release were economically feasible, it would so unduly shorten the exploitable life of each motion picture that to supply the demand, the product would have to be greatly increased. It is common knowledge that, even at the present time, it is difficult to find enough stories which lend themselves to motion picture treatment. The feverish competitive bidding by studios for "best sellers," the constant resort to those escapes for mediocrity, the historical incident as a source of inspiration, the life portraits of popular figures, the attempts to dramatize momentary topics of discussion, are all indicative of the problem which a demand for a greater number of pictures might create.

All these factors warrant the conclusion that the system of runs and clearances as it functions now in the Los Angeles area, is not only necessary, but is also, in all respects a reasonable attempt to solve a difficult and exacting problem. [145]

V.

"First-Run" Limitations

What has gone before shows that the specific facts on which the limitation of first-runs to definite areas in the Los Angeles district is dictated by real and definite conditions which justify it, and that it has been applied uniformly and without discrimination.

This does not mean that there have not been apparent exceptions or deviations. But they can be justified, on the whole.

The extensions of first-run to other apparently urban areas have been what might be called "the peripheral" kind. They concerned theatres which, whether they are or are not within the city limits of Los Angeles, are in neighborhoods which are distinct communities with a life of their own. Los Angeles, because of its great geographical extent, which has supplied the folklore for so many "Los Angeles City Limits" jests, has developed many concentrated, self-contained areas of population, which have a communal life of their own, with business and trade centers, home or civic activities of their own, and even regional local newspapers. Some of them have professional groups who confine their practice to the locality, and are banded into regional associations. People live, often earn their livelihood, shop and amuse themselves within a confined district. The phenomenon has called for the decentralization of business. And regular self-sufficient business and trading centers have grown up with all the facilities needed for metropolitan living. Indeed, some [146] of our large department stores have established branches to forestall competition. In many instances, these communities are as separate and distinct from what one witness has called "the urban core" as if they were independent municipalities. We illustrate by mentioning some with which comparisons have been made. Westwood Village has become a unique university community because of the location of

the University of California at Los Angeles there, with a typical college-town atmosphere, although it is a part of the City of Los Angeles. San Pedro, because it is the Port of Los Angeles, has all the characteristics of a seaport town, although it is a distinct municipality. So has Wilmington which adjoins it, although it is a distinct municipality. They, too, belong together. Ocean Park, although a part of the City of Los Angeles, is a beach resort as distinct as Santa Monica, which is a separate municipality, and more a part of it than of Los Angeles.

New districts are constantly being developed. The patronage of the theatres located in these districts is drawn from the residents of the districts, not so much because of distance to metropolitan theatres, but because the habit pattern of the residents ties their entire lives, including their entertainment to the locality, and the patronage of their theatres does not compete with, or detract from, the patronage of the metropolitan areas. Theatrically, as to other districts, Los Angeles is a "city on wheels," and mere distance from another theatre may not give assurance that the residents will not seek their entertainment at the metropolitan [147] theatres.

So we have an important fact in the actual living habits of people from which the theatre-goers are drawn namely, the existence of regular oases of population with separate lives, which calls for a definite method of treatment in the matter of motion picture exhibition, and is responsible for the differentiation between theatres.

Courts do not condemn classifications so long as a reasonable ground exists for either an inclusion or exclusion of groups or territories. Long ago, Mr. Justice Holmes insisted that

"a lack of abstract symmetry does not matter," (27) when it comes to classification. He added:

> "The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class." (28)

Some inequality is inherent in any differentiation or classification. And its existence is not a valid ground for invalidating a reasonable classification, even when the question of due process is involved. (29) All that the courts require is that the classification be not arbitrary. If it is not, and it is based upon facts which warrant separate treatment, the classification will be upheld, despite absence of perfect equality. For the problem to consider is

> "not a geometrical equation"

between the included and excluded group or territory, but [148]

> "whether the difference does injustice to the class generally, even though it bear hard in some particular case." (30)

In consequence, allowance must be made for what Mr. Justice Holmes, in the case just cited, called "a little play in its joints." (31) Otherwise, the machinery would not work.

In assaying the particular limitation, we find that it is based on demographic factors with which students of population are familiar. And the conclusion is warranted that there are inherent differences in the different localities in the Los Angeles areas which warrant the general exclusion from first-runs of certain urban theatres, except those which are in localities with a life of their own, such as those already mentioned and in Inglewood, Belvedere Gardens, Huntington Park and others referred to in the record.

Whatever may have been the practice of the defendants before the decree of the statutory court, it is quite evident that whether we take as the starting point the date of the final decree, June 25, 1948, or the consent decree as to the Paramount defendants, March 3, 1949, or the consent decree as to others, February 5, 1950, there has been an abandonment of the condemned distributing policies,

such as "zoning," "block-booking," "key" deals, and the like, a revision of clearances and the establishment of a system of picture-by-picture exploitation. As is shown in the record, the pattern is practically the same as to [149] all producers. When a picture is ready for release, notices are sent out to exhibitors and competitive negotiations begin, as to the first-runs or pre-release showings. The producer, or the agency through which he distributes, selects from the offers the "best deal" from his standpoint, considering fixed price or percentage, length of run and other factors. The exhibitor determines his own admission price. The offer, in some instances, states the price ordinarily charged. It was explained that this is necessary. For if the offer is on a percentage basis, the admission to be charged by the theatre may become a factor in its acceptance, as it would in any joint venture in which remuneration is measured by income. If the exhibitor has several theatres, the price for the run is negotiated as to each picture, although agreement may be reached as to all theatres at the same time. At times, in the case of pictures exhibited on a percentage basis, there is a sliding scale, depending on the expense of the house, the ultimate rental varying with variations in such expense. From the date of the decree in the anti-trust action, December 31, 1946, and, in some instances, from the date of the opinion which preceded it, June 11, 1946, these changes in method of exhibition began to be put into effect. The process has continued to date.

Any present preferences which appear in the record as to "first-runs" are due to the general conditions already discussed which call for different classification and treatment, and to the special additional factors just named. [150]

On the whole, the "first-run" practice, as applied to the Los Angeles area and as it affects the plaintiff, is not unreasonable. If the exclusion of the Baldwin Theatre from it harms the plaintiff, the result is not consequent upon

any illegal concerted action of the defendants, but is fortuitous and not actionable in this or any other type of action. It is traceable to the fact that the Baldwin, unlike other theatres in areas with which it is sought to compare it, is not in an integrated community, and that there are distinct limitations to the commercial zone in the Baldwin area. This restricts possibilities for rapid growth in the future, or development as a concentrated populated area. Geographical and other barriers stand in the way of intensive development. To these may be added the fact that the Baldwin, while located in what may be, by certain standards, suburban territory, is, in reality, part of urban Los Angeles. Tests show that patronage in suburban theatres is stable, drawn from a more or less concentrated area within a radius of four miles. However, the proximity of the Baldwin to theatres in the Crenshaw and Wilshire Districts may cause it to draw patronage from the areas which they serve. This fact and its price policy are also determinates. In sum, all these and other factors already alluded to (and still others to be adverted to further on in the discussion), considered in the light of the basic idea which calls for differentiation in classification between the Baldwin and other theatres, warrant its exclusion from first run. [151]

VI.

Subsequent Availability

The main considerations which call for classification of theatres outside the first-run group obtain also as to the classification in the 21-day availability group. The testimony as to these matters overlapped. It would be difficult and wholly unprofitable to segregate it. More, it is not the object of this opinion to outline in detail the testimony in this case, all of which has been assayed. Only the result will be given.

It should not be forgotten that the Government, in the *Paramount* case, sought to condemn all clearances. But the

Courts refused to sustain this view. They condemned only unreasonable clearances. (32) This is now the accepted law. (33) This view of the law has been criticized by certain writers who see in the clearance system a method of price-fixing which should have been outlawed in its entirety. (34) Taking, as we must, the view of the law expressed by the Courts, our problem is to determine the reasonableness of the 21-day availability established for the plaintiff's theatre, the Baldwin.

As a general rule, the same availability is established by all producers. But here, again I am convinced that this was not the result of concert, but flowed from the very nature of the clearance system. Indeed, instances exist of different availabilities in the same theatre for the productions of different companies. Whenever this occurred, it brought objections from theatre-owners who complained that, by this method, they were prevented from [152] relying upon a "constant flow" of pictures. It is to the interest of the producers and exhibitors that the exploitable life of a picture be not too short. The "staggered" system lengthens the period. The basic idea behind clearances is that the farther the location of a theatre is from a focal point—such as urban Los Angeles—the shorter the clearance should be. The Baldwin is considered a part of urban Los Angeles. It would normally draw from the Crenshaw and Wilshire areas. Any change in its availability would require corresponding changes in all three areas. These, in turn, would call for changes in the theatres adjoining these areas. The result would be a shortening of the exploitable life of the picture, with consequent harm to both producer and exhibitor.

Common ownership of similarly situated theatres may result in identical availability as a matter of choice by the operator. But I find no instance of "allocations of territory." To the contrary, availability is in flux. There is no rigid uniformity. There are constant changes and "move-ups." Loew's Inc., "the major" of "majors," as

it were, because of its belief in the superior quality of its productions, determines availability regardless of the policy or wishes of others. Their representatives asserted very emphatically that, while they negotiate with exhibitors, their ultimate action is not determined with reference to the wishes of any exhibitor or class of exhibitors, or of other producers. There is similar testimony as to the other defendants. Many changes in availability have been made from year to year. All producers and distributors consider the [153] plaintiff's theatre, the Baldwin, as being in the same competitive area with the Leimert, Bard's Adams and Crenshaw. For this reason, any change as to availability made as to any of them, would call for adjustment as to the others. By the same token, the theatres in independent areas—whether they be separate municipalities, such as Glendale, Pasadena, or Inglewood, or integrated communities of the type referred to in the preceding portion of this opinion—are not deemed to be in competition with the Los Angeles metropolitan theatres.

The granting to such theatres of an availability which is denied to urban neighborhood theatres is, therefore, warranted by these and other special considerations referred to in the preceding discussion.

When the system of double billing is also taken into account, one can readily see how difficult it would be for the theatre-owners to fill programs unless the pictures which come from different producers are available at about the same time and on the same availability. These factors relate directly to the problem of first-run. The significance of advertising of first-runs has already been adverted to. At times, the advertising cost exceeds the rental received from the first-run theatres in the area. In one instance referred to at the trial, $45,000.00 was spent by one of the defendants to advertise a new picture. The rental received from the two first-run theatres in the area which served this defendant as "showcases" was $38,000.00. The loss was defended upon the ground that the expense helped

establish the picture for the subsequent-run theatres (35). [154]

Ultimately, not only the producers, but also the exhibitors benefit by the exploitations of first-runs and the adherence to a constant clearance. Whenever a change of availability is asked, the producer has two considerations to take into account: (1) Whether the change would result in additional revenue, and (2) whether the change would affect other theatres in the area. While methods differ to some extent, on the whole the pattern is the same. Studies of the area are undertaken and a recommendation is made by the regional sales manager who approves the change or rejects it. Final approval must be given by the New York Office in those instances where the regional officers do not have the final authority to act. It was the positive testimony of the sales representatives of all the defendants that other producers or exhibitors were not consulted. They also defended the limitation of first-runs to a small number of "showcases," as the only means of making a picture valuable for subsequent exhibitors.

Few people come from peripheral areas to the metropolitan areas. But if all the theatres were opened, or the number of "first-runs" were increased, all the patronage from these peripheral areas would combine and some 50 per cent of the patronage would be lost. And, generally, shortening of playing time might harm the individual exhibitor in subsequent-run theatres. The multiple theatre operator might benefit. But this is inherent in such ownership, and we cannot prevent it. And any increase in the number of theatres playing the same pictures—as one witness put it—"spreads the patronage thinner" as to the individual [155] exhibitor.

Indeed, Harry C. Arthur, Jr., president of the plaintiff corporation, testifying in this court before another Judge —in an action relating to the franchise whereby they are given exclusive first-runs in their two theatres for Paramount productions—defended the clearance system and the

reasonableness of the 21-day protection for their own theatres. The following colloquies are taken from the record in that case. (36)

"Q. (By Mr. Hardy): Mr. Arthur, in your experience as a seller of motion pictures, have you sold them on clearances? A. Yes.

"Q. Invariably? A. Yes.

"Q. In your experience as a motion picture exhibitor and purchaser of pictures, have you purchased them on clearances? A. Yes.

"Q. Invariably? A. Yes.

"Q. Now, based on that experience what would you say as to whether or not 21-days' clearance for first-run pictures at the Paramount Theatre has been reasonable?

* * *

"A. I don't think that the 21-day clearance of the Partmar Corporation governing the Downtown Paramount Theatre is reasonable to the theatre. [156]

"The Court: You mean to Partmar?

"The Witness: I think it is unreasonably short.

"The Court: To Partmar?

"The Witness: Yes, sir.

"The Court: You think it should be longer?

"The Witness: Yes, sir.

* * *

"The Court: Based upon your experience in the motion picture industry, is it your opinion that clearances are necessary between the runs?

"The Witness: Yes, sir."

* * *

"Q. (By Mr. Hardy): I asked you to state your opinion as to whether 21-day clearance would be reasonable or unreasonable to the second-run theatres on Paramount pictures.

* * *

"A. From our standpoint, I think that they have an advantage on the 21 days. If I testify that the Paramount Theatre should have a longer clearance, I certainly can't agree that there should be 21 days. In

other words, they should be further behind the Paramount Theatre. [157]

• • •

"Q. Do you mean that it is not unreasonable as to them?

"A. No.

• • •

"Q. What would you say as to whether or not the 7-day clearance is reasonable?

"A. The 7-day clearance——

"Mr. Chance (Interrupting): Over what?

"Mr. Hardy: I am talking always about a clearance over the first-run use of a picture in the Paramount Theatre during the period from 1939 to 1947.

"The Witness: The seven-day clearance is too short for the Paramount Theatre. It should be longer.

"Q. (By Mr. Hardy): What would you say as to the 14-day clearance?

"A. That should be longer, too.

"Mr. Chance: Does that mean it is unreasonable?

"The Witness: That means that it is unreasonably unfair to the Paramount Theatre.

"The Court: You mean it is unreasonably short?

"The Witness: That is what I mean, exactly, sir." (Emphasis added.)

In his deposition in the case at bar, somewhat similar admissions were made by Mr. Arthur as to the plaintiff's determination to retain the 21-day protection for their theatres, which need not, however, be given in detail. All these admissions mean that any change of clearance, even as to the Baldwin, would harm the plaintiff's first-run theatres, or, as the witness put it, they might suffer damage downtown for any benefit to the Baldwin. [158] In explanation of the seeming anomaly in seeking a better position for the Baldwin, although convinced that it might harm their first-run theatres, the witness claimed that the demand for the Baldwin is warranted by the fact that theatres which they considered similarly situated—especially a theatre in Ingelwood—had been given a better clearance. This might be the perfect answer, if there were no rea-

sonable grounds for giving the Inglewood theatre a different classification. If—as already appears from the discussion—Inglewood, because it is an independent municipality and an integrated community with a life of its own, does not theatrically impinge upon urban Los Angeles, then the force of the justification is lost.

Of itself, an admission may or may not prove a fact. (37) When it does not, it supplies—for whatever it may be worth—an inconsistent attitude of the same party. Wigmore thinks that in this lies its chief value as a "witness' self-contradiction." (38) Hence, the concession as to the reasonableness of the clearance system and the 21-day protection—although limited to two theatres and the product of one of the defendants—lends support to the contention that, other things being equal, the same claim could be made for the products of other companies which use different theatres as "showcases," whose first-runs they must protect.

In consequence, the admission, when correlated to the entire problem of clearances and to the facts already discussed, speaks for the reasonableness of the classification. [159]

It should be added that the evidence in the record indicates that, while the Baldwin, so far as physical appointments, equipment, and projection facilities, compares favorably with other theatres in the same class, and even with some of the suburban theatres to which a better clearance has been given, it was notoriously a "bad" producer of revenue in the 21-day group.

In sum, the limitation of the plaintiff to a 21-day availability finds support in special factors which affect the distribution of motion pictures. As these factors called for the same result, they produced an identity which did not spring from design, but from similarity of situations. All combined to furnish a reasonable basis for the classification which satisfies established legal norms. Having reached this conclusion as to the 21-day availability, we need not explain in detail why the denial of 7 or 14-day

availability for the Baldwin can also be justified. The same factors which warrant the establishment and retention of the 21-day limitation exclude an improved condition at the present time.

Allusion has already been made to the fact that the Los Angeles area is peculiarly sensitive as to clearances and availability. Even a rumor of possible change of availability brings immediate demands on the part of many exhibitors. When it was rumored in 1949 that Loew's might "ease up" on its [160] first-run policy, an immediate application for such run was made by the Leimert,—one of the Baldwin competitive theatres. Similar requests were made constantly of other producers. Some requests were granted. And the number of theatres changing availability is constantly increasing. The following comparative tables show the differences between the situations in 1945 and 1950.

(A)

PARAMOUNT

(Summary of changes in availability shown on Exhibit AW)

	FWC * clear runs	Independent clear runs	Competitive situations
		7-Day Availabilities	
1945	16	0	0
1950	2	0	7 situations involving 9 FWC theatres bidding against 18 independents.
		14-Day Availabilities	
1945	3	0	0
1950	4	3	3 situations involving 5 FWC theatres bidding against 10 independents. 1 situation of 3 independents.
		21-Day Availabilities	
1945	18	7	0
1950	7	18	9 situations involving 10 FWC theatres bidding against 16 independents. 1 situation involving 4 independents.

* Fox West Coast.

(B)

RKO

(Summary of changes in availability shown on Exhibit BR)

	FWC clear runs	Independent clear runs	Competitive situations
7-Day Availabilities			
1945	15	1	0
1950	2	0	6 situations involving 10 FWC theatres bidding against 19 independents.
14-Day Availabilities			
1945	2	1	0
1950	2	9	4 situations involving 6 FWC theatres bidding against 10 independents. 1 situation involving 5 independents.
21-Day Availabilities			
1945	14	5	0
1950	9	23	5 situations involving 7 FWC theatres bidding against 7 independents. 2 situations involving 6 independents.

(C)

UNIVERSAL

(Summary of changes in availability shown on Exhibit BU)

	FWC clear runs	Independent clear runs	Competitive situations
7-Day Availabilities			
1945	18	2	0
1950	3	1	6 situations involving 9 FWC theatres bidding against 14 independents.
14-Day Availabilities			
1945	0	1	0
1950	1	7	1 situation involving 2 FWC theatres bidding against 2 independents. 1 situation of 4 independents.
21-Day Availabilities			
1945	18	6	0
1950	12	26	5 situations involving 5 FWC theatres bidding against 6 independents.

(D)

LOEW'S

(Summary of changes in availability shown on Exhibit BI)

	FWC clear runs	Independent clear runs	Competitive situations
		7-Day Availabilities	
1945	14	0	0
1950	2	1	6 situations involving 10 FWC theatres bidding against 17 independents.
		14 Day Availabilities	
1945	2	1	0
1950	3	3	1 situation involving 2 FWC theatres bidding against 1 independent. 2 situations involving 6 independents.
		21-Day Availabilities	
1945	20	7	0
1950	7	17	7 situations involving 10 FWC theatres bidding against 10 independents. 2 situations involving 5 independents.

(E)

UNITED ARTISTS

(Summary of changes in availability shown by reference on Transcript Pages 2317 and 2323)

	FWC clear runs	Independent clear runs	Competitive situations
		7-Day Availabilities	
1945	16	1	0
1950	3	1	4 situations involving 8 FWC theatres bidding against 12 independents.
		14-Day Availabilities	
1945	3	0	0
1950	4	3	1 situation involving 1 FWC theatre bidding against 2 independents. 1 situation of 5 independents.
		21-Day Availabilities	
1945	14	6	0
1950	13	32	0

Statistical data introduced by the plaintiff in rebuttal show similar changes even on a narrower range of time. As of August 10, 1949, there were, in the Los Angeles area, 22 Fox West Coast operators on a first-run basis. As of December 31, 1950, the number had been reduced to 16. The situation as to other chain owners remained unchanged. As of August 10, 1949, there were 21 Fox West Coast theatres on a 7-day availability. As of December 31, 1950, the number was reduced to 16. They remained constant as to Warner Brothers. They increased from 0 to 5 as to United Artists Theatre Circuit, Inc., and from 9 to 12 as to others. As of August 10, 1949, there were 15 Fox West Coast Theatres on a 14-day availability. The number was reduced to 12 on December 11, 1950. It remained constant as to Warner Bros., increased from 0 to 2 as to United Artists Theatre Circuit, Inc., and from 15 to 16 as to others.

These figures are typical. The contrast between between the 1945 and 1950 figures warrants the conclusion made by one of the witnesses that whereas the Fox group had a majority of the first runs in 1945, they had the least in 1950. And, even within the narrower range chosen by the plaintiff, there is a decrease in the favorable situations so far as Fox West Coast group is concerned.

All these point to the fact that any change affects others similarly situated, be they multiple owners or individual operators. Even a single change begins a chain reaction which runs its course, and in time, affects more than the theatres involved in the particular change at the particular moment. Consequently, [166] we are not confronted with a situation that is static, or is brought about by design or concert on the part of the defendants to keep it so by illegal means. We are met with a situation which is in flux and which must be considered, not in the light of what the particular defendants may have done before the courts interdicted certain of their practices, but in the light of what they have done since and are doing today.

Here, again, even if we find no substantial change, we cannot attribute the absence of change to design unless we also find that conditions which have arisen since the court's interdictions called for a change. One of the difficulties with the plaintiff's position in this case is the fact that it assumes that the court decree called automatically for changes. From this it postulates that if there be no change, that, of itself, is proof that illegal practices have continued to date. We cannot agree.

This is not a "price-fixing case," or a "block-booking case," where the very existence of the practice calls for condemnation. The practice with which we are concerned in this case relates entirely to clearances. And the system of clearances has not been condemned by the courts. To the contrary, they have sustained it when reasonable. So, before we can find a particular clearance to be actionable, at the suit of the plaintiff, we must be satisfied that (1) it is unreasonable as to them, and (2) that its impact on them has harmed them. The most important of these elements is the first one. For, if the practice as applied to the plaintiff is not unreasonable, it matters not how much they have been harmed. For such harm is not actionable [167] under the anti-trust statutes.

Our function is to protect the competitive freedom of interstate commerce in buying and selling motion pictures. (39) This is one of the aims of the anti-trust laws. We must keep the stream of commerce clear of monopolistic practices which the anti-trust laws condemn. And the treble damage action is one of the means of achieving this (40) end.

In the case before us, we are concerned with certain specific clearances and availabilities as they affect the plaintiff. If, as the discussion which precedes indicates, we find that these clearances are warranted by special conditions which reasonable persons may take into consideration in determining their action, it is our duty to say so. No parallelism, conscious or unconscious, can overcome

a finding of reasonableness. (41) And it is not our function in this type of action to secure a better bargain for a dissatisfied exhibitor. Our sole aim is to vindicate the anti-trust laws in so far as their violation may have brought injury to the plaintiff. What has gone before indicates clearly the factual and legal foundations for the conclusion that there has been no violation of the anti-trust laws by the defendants which has resulted in actionable injury to the plaintiff.

Judgment will, therefore, be for the defendants. More specific findings will be contained in the decision to be filed simultaneously.

Dated this 17th day of August, 1951.

/s/ LEON R. YANKVICH,
Judge. [168]

NOTES TO TEXT

1. 15 U. S. C. A., Secs. 1, 2.

2. 15 U. S. C. A., Sec. 15.

3. *Balian Ice Cream Co.* v. *Arden Farms,* 1950, D. C. Cal., 94 F. Supp. 796; *F. & H. Ice Cream Co.* v. *Arden Farms,* 1951, D. C. Cal., ____; F. Supp. ____; *United States* v. *Richfield,* 1951, D. C. Cal., ____ F. Supp. ____.

A brief, yet comprehensive, statement of the restraints on interstate commerce which may arise from restrictive practices relating to the exhibition of motion pictures is given in *White Bear Theatre Corp.* v. *State Theatre Corp.,* 1942, 8 Cir., 129 F. (2) 600, 604:

> "The competitive freedom of such a market, in both buying and selling, is one of the principal things which the Sherman Act was intended to protect. Where that freedom is interfered with, by a contract, combination, or conspiracy, that from a public viewpoint harmfully restrains competition, or by an attempt, combination or conspiracy to monopolize, that has a direct wrongful purpose or other probable prejudicial consequences to the public interest, the force of the Sherman Act may be called into operation against it,

on the basis of the public wrong involved, through the public or private remedies which the Sherman and Clayton Acts provide." [169]

4. Most of the literature on the subject is given in G. E. Hale, Size and Shape of the Individual Enterprise as a Monopoly, University of Illinois Law Forum, Vol. 1950, Winter, No. 4, p. 515. And see M. A. Adelman, Effective Competition and the Antitrust Laws, 1941, 61 Harvard Law Rev., p. 1289; Edward H. Levi, The Antitrust Laws and Monopoly, 1947, 14 U. of Chicago Law Review, p. 153; Eugene V. Rostow, The New Sherman Act: A Positive Instrument of Progress, 1947, 14 U. of Chicago Law Review, p. 567; Eugene V. Rostow, Monopoly Under the Sherman Act, 1949, 43 Ill. Law Rev., p. 745.

5. *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 1915, 236 U. S. 165, 173; Fifty Years of Sherman Act Enforcement, 1938, 49 Yale Law Journal, p. 284, 286; see additional references in *Balian Ice Cream Co.* v. *Arden Farms, supra,* Notes 20, 21, 22.

6. *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co., supra; Shotkin* v. *General Electric Co.*, 1948, 10 Cir., 171 F. (2) 235; see Thomas C. McConnell, The Treble Damage Action, in University of Illinois Law Forum, Vol. 1950, Winter, No. 4, p. 256 *et seq.*

7. 15 U. S. C. A., Sec. 16.

8. *Emich Motors Corp.* v. *General Motors Corp.*, 1951, 340 U. S. 558.

9. *Emich Motors Corp.* v. *General Motors Corp., supra,* p. 571. [170]

10. *United States* v. *Paramount Pictures, Inc.*, 1948, 334 U. S. 131.

11. *United States* v. *Paramount Pictures, Inc.*, 1946, D. C. N. Y., 66 F. Supp. 323, 345.

12. *United States* v. *Paramount Pictures, Inc.*, 1948, 334 U. S. 131, 144. And see Bertrand, Evans and Blanchard, The Motion Picture Industry, A Pattern of Control, 40-41 (TNEC, Monograph No. 43, 1941) cited in *Schine Theatres* v. *United States*, 1947, 334 U. S. 110, 121.

13. *Schine Theatres* v. *United States*, 1947, 334 U. S. 110, 121.

14. *United States* v. *Paramount Pictures, Inc.*, 1948, 334 U. S. 131, 144-148; *Schine Theatres* v. *United States*, 1948, 334 U. S. 110, 121; *Fifth and Walnut, Inc.*, v. *Loew's, Inc.*, 1949, 2 Cir., 176 F. (2) 587; *United States* v. *Paramount Pictures, Inc.*, 1946, D. C. N. Y., 66 F. Supp. 323, 341-343.

15. *Interstate Circuit, Inc.*, v. *United States*, 1939, 306 U. S. 208, 221-226; *United States* v. *Masonite Corp.*, 1942, 316 U. S. 265, 275; *Wm. Goldman Theatres, Inc.* v. *Loew's, Inc.*, 1945, 3 Cir., 150 F. (2) 738, 743; *Ball* v. *Paramount Pictures, Inc.*, 1948, 3 Cir., 169 F. (2) 317, 320; *Bordonaro Bros. Theatres* v. *Paramount Pictures, Inc.*, 1949, 2 Cir., 176 F. (2) 594, 596-597.

16. *Fifth and Walnut, Inc.*, v. *Loew's, Inc.*, 1949, 2 Cir., 176 F. (2) 587, 594; *Westway Theatre, Inc.*, v. *Twentieth Century-Fox Film Corp.*, 1940, D. C. Md., 30 F. Supp. 930, 934-935; [171] and see *Binderup* v. *Pathe Exchange*, 1923, 263 U. S. 291, 311-312; *United States* v. *Griffith*, 1948, 334 U. S. 100, 105-107; *United States* v. *Crescent Amusement Co.*, 1944, 323 U. S. 173, 183-185.

17. *Bigelow* v. *RKO Pictures*, 1946, 327 U. S. 251, 260-266; *Wm. Goldman Theatres* v. *Loew's, Inc.*, 1948, 3 Cir., 164 F. (2) 1021; *Milwaukee Towne Corporation* v. *Loew's, Inc.*, 1951, 7 Cir., ____ F. (2) ____; and see Note, The Requirement of Certainty in the Proof of Lost Profits, 1950, 64 Harvard L. Rev., pp. 317-325.

18. *United States* v. *Paramount Pictures, Inc.*, 1947 D. C. N. Y., 70 F. Supp. 53.

19. *Emich Motors Corp.* v. *General Motors Corp.*, 1951, 340 U. S. 558.

20. *United States* v. *Paramount Pictures, Inc.*, 1948, 334 U. S. 131.

21. *Schine Theatres* v. *United States*, 1947, 334 U. S. 110.

22. *Fifth and Walnut, Inc.* v. *Loew's, Inc.*, 1949, 2 Cir., 176 F. (2) 587.

23. See McDonough and Winslow, The Motion Picture Industry; *United States* v. *Oligopoly*, 1949, 1 Stanford Law Review, p. 385.

24. *Paramount Pictures Corp.* v. *Partmar Corp.*, 1951, D. C. Cal., 97 F. Supp. 552. [172]

25. *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 1941, 312 U. S. 457, 467-468.

> "The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured." (*Kiefer-Stewart Co.* v. *Seagram & Sons*, 1951, 340 U. S. 211, 214.)

And see *Milgram* v. *Loew's*, 1950 D. C. Pa., 94 F. Supp. 416, 419. *Moore* v. *Mead Service Co.*, 1951, 10 Cir., 20 U. S. Law Week, 2013. The decision of the Court of Appeals for the Ninth Circuit in *First National Pictures* v. *Robinson*, 1934, 9 Cir., 72 F. (2) 37, in so far as it may express a contrary doctrine, need not be followed, in view of the later decisions of the Supreme Court just cited, holding the contrary. In reality, however, all that the case decided was that the distributor in that case having agreed to a zoning system, could not complain when, pursuant to the same policy, a rezoning took place which harmed him.

26. *Gray* v. *Commodity Credit Corp.*, 1945, D. C. Cal., 63 F. Supp. 386, 397-398; affirmed on appeal in *Gray* v. *Commodity Credit Corp.*, 1947, 9 Cir., 159 F. (2) 243. [173]

27. *Patsone* v. *Pennsylvania*, 1914, 232 U. S. 138, 144.

28. *Patsone* v. *Pennsylvania*, *supra*, p. 144.

29. *Bryant* v. *Zimmerman*, 1928, 278 U. S. 63, 73-77; *Skinner* v. *Oklahoma*, 1942, 316 U. S. 535, 540; *Railway Express Agency* v. *New York*, 1949, 336 U. S. 106, 112-117.

30. *Bain Peanut Co.* v. *Pinson*, 1931, 282 U. S. 499, 501.

31. *Bain Peanut Co.* v. *Pinson*, *supra*, p. 501.

32. *United States* v. *Paramount Pictures, Inc.*, 1946, D. C. N. Y., 66 F. Supp. 323, 341.

33. See Part III of this Opinion.

34. Eugene V. Rostov, The New Sherman Act: A Positive Instrument of Progress, 1947, 14 U. of Chicago Law Review, p. 567, 596; John R. McDonough, Jr. and Robert L. Winslow, The Motion Picture Industry: *United States* v. *Oligopoly*, 1949, 1 Stanford Law Review, p. 385, 413.

35. Such loss is rare and is referred to merely to emphasize the importance of first-runs. On writer has stated that first-runs

> "produce well over one-half and in some areas four-fifths of the total gross income."

And the same writer notes that

> "Between a first-run showing and a late one during the same year, the difference in license fees may be 99.9 per cent." [174] (M. A. Adelman, Effective Competition and the Antitrust Laws, 1948, 61 Harvard Law Review, p. 1289, 1319).

36. *Paramount Picture Theatres Corp.* v. *Partmar Corp.*, No. 6906-HW.

37. Jones on Evidence, 3rd Ed., 1924, Secs. 235-236.

38. IV Wigmore on Evidence, 3rd Ed., 1940, Sec. 1098.

39. *White Bear Theatre Corp* v. *State Theatre Corp.*, 1942, 8 Cir., 129 F. (2) 600, 604; and see *Montrose Lumber Co.*, v. *United States*, 1941, 10 Cir., 124 F. (2) 573, 578.

40. See Part II of this Opinion.

41. The similarity sought to be established between the situation which obtains in this case and the one which confronted the Court in *Milgram* v. *Loew's, Inc.*, 1950, D. C. Pa., 94 F. Supp. 416, is unavailing. There, the Court was dealing with the exclusion of a new type of theatre, the suburban drive-in, from "first-runs." It condemned it because it found that the denial of "first-run" had

> "nothing to do with the location, size, equipment, appointments or policy of operation of his theatre or of any particular drive-in theatre as compared with others of the same type, nor with any local competitive situation." (*Milgram* v. *Loew's Inc.*, *supra*, p. 420-421.) [175]

Here, the "competitive relation" of the plaintiff's theatre to other theatres similarly situated and to other urban Los Angeles area theatres is a determinative factor which calls for differentiation. So, "conscious parallelism" (See Note, Conscious Parallelism, Fact or Fancy, 3 Stanford Law Review, 1951, p. 678), even if shown to exist, would not determine the matter, because of the many factors already discussed which give the source and justification for the action of the defendants. See *Dipson Theatres, Inc.*, v. *Buffalo Theatres, Inc.*, 1951, 2 Cir. ____ F. (2) ____, decided on July 25, 1951.

[Endorsed]: Filed August 17, 1951.

Judgment of the Court of Appeals, R. 4118.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13,308.

FANCHON & MARCO, INC., *Appellant*,

v.

PARAMOUNT PICTURES, INC., et al., *Appellees*.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: August 11, 1954,
PAUL P. O'BRIEN, *Clerk*.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 11573-Y

FANCHON & MARCO, INC., *Plaintiff*,

vs.

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S INCORPORATED; RKO RADIO PICTURES, INC.; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC., UNITED ARTISTS CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; NATIONAL THEATRES CORPORATION; NATIONAL THEATRES AMUSEMENT CO., INC.; FOX WEST COAST THEATRES CORPORATION; GRIFFITH-COLMAN, INC., WILLIAM J. KUPPER, JR., and JANE C. KUPPER, Defendants.

JUDGMENT

The Court having made its Findings of Fact and Conclusions of Law, Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

1. None of the defendants has contracted, combined or conspired among themselves or with any other person or corporation to restrain trade or commerce among the several states in violation of Sections 1 or 2 of the Sherman Act (15 [208] U. S. C. A. Sections 1 and 2). None of the defendants has monopolized or attempted to monopolize, nor combined or conspired to monopolize any part of the trade or commerce among the several states in the production, distribution or exhibition of motion pictures in violation of Section 2 of the Sherman Act (15 U. S. C. A. Section 2).

2. None of the defendants has done anything forbidden in the anti-trust laws of the United States to the injury of plaintiff's business or property and none of the defendants

has violated the anti-trust laws of the United States to the loss or damage of plaintiff.

3. Plaintiff is not entitled to recover any damages from the defendants or any of them.

4. Plaintiff shall take nothing from defendants or any of them and defendants shall recover from plaintiff their costs of suit in the sum of $2515.78.

Done in Open Court this 1st day of November, 1951.

/s/ LEON R. YANKWICH,
District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 1, 1951.

Entered November 1, 1951.

Letter Requesting Changes in Opinion.

LAW OFFICES OF
O'MELVENY & MYERS
433 South Spring Street
Los Angeles 13
August 28th, 1951

In Reply Refer to
7639

Subject
FANCHON & MARCO, INC.
vs.
WARNER BROS., *et al.*

Honorable Leon R. Yankwich
Judge of the United States District Court
United States Postoffice and Courthouse Building
Los Angeles 12, California

Dear Judge Yankwich:

Although I am supposed to be on my vacation, my associates have been good enough to furnish me with a copy of your opinion in the above matter, together with a copy of Mr. Carman's letter to Mr. Childress pointing out a number of errors in transcription in the typewritten opinion furnished to my office. I have studied your comprehensive opinion with care, and I have discussed it with my associates. We all feel that this opinion is of the greatest importance and that, when published in Federal Supplement, it will be utilized to a great extent by judges, not only in this district, but throughout the entire country. For that reason I think it appropriate to call your attention to a few statements in this opinion which you might wish to clarify before it is so published. As I shall point out, these statements are capable of such interpretation that they might be used in a manner which I am sure was never intended by you and, if printed in Federal Supplement without clarification, might become a source of misunderstanding not only in other cases of this character pending in your Court, but in other cases of this character pending before other judges. The matters I refer to are as follows, and my reference will be to the printed copy of your opinion, a copy of which I enclose:

1. At the bottom of page 24 and the top of page 25 you state that "inherent differences in the different localities

in the Los Angeles area" "warrant the general exclusion from first runs of certain urban theatres", and then you follow that with an exception which reads as follows:

> "except those which are not localities with a life of their own, such as those already mentioned and in Inglewood, Belvedere Gardens, Huntington Park and others referred to in the record." (The others already mentioned in your opinion are Westwood, San Pedro, Wilmington, Ocean Park and Santa Monica.)

Stated in this manner, there is an inference that you are holding that the distributors are not justified in withholding first runs day and date with downtown Los Angeles from Inglewood, Belvedere Gardens, Huntington Park, Westwood Village, San Pedro, Wilmington, Ocean Park and Santa Monica. I do not believe that you intend so to hold. The evidence, you will recall, shows that none of those areas, except San Pedro, plays first run day and date with downtown Los Angeles. They play "first run" in their respective areas and such playing position is frequently referred to as "first run" Inglewood, "first run" Huntington Park, etc., but all such areas play subsequent to first run Los Angeles. Most of those areas play their runs 7 days after closing of downtown Los Angeles, though most distributors play Westwood 14 days after closing of downtown Los Angeles and play Wilmington after San Pedro. I do not believe it is your intention to hold, at least in this lawsuit, that the distributors are violating the Sherman Act by refusing to play these suburban areas first run day and date with downtown Los Angeles.

It is of great importance to us and will be of great importance to the judges in the other courts of this district that your opinion be clarified on this point. For instance, there is now pending before Judge Harrison the case of *Markoy* vs. *Twentieth Century-Fox,* in which the operator of the Crown Theatre in Pasadena is asserting that the distributors have violated the law in refusing to sell him first run day and date with downtown Los Angeles. We do not want the plaintiff in that case to be citing your opinion against us as holding that the distributors have violated the law by refusing first run day and date with downtown Los Angeles to these suburban cities when I am sure no such inference was intended. I feel that much confusion would be eliminated if your opinion were to be

clarified to indicate that the suburban areas above mentioned (except San Pedro) do not play first run day and date with downtown Los Angeles, and that it was not your intention to hold that the distributors have violated the Sherman Act by refusing to grant to such suburban areas, first run day and date with downtown Los Angeles.

2. At page 23, in the middle of the first full paragraph, at page 29, at the end of the first paragraph, and at page 34 at the end of the first paragraph, you state in substance that the theatres in the suburban areas are not in competition with the downtown, Hollywood and the Wilshire districts. On the other hand, on page 31 at the top of the page, you make it very clear that the suburban theatres in the aggregate are in competition with the downtown, Hollywood and Wilshire district theatres, because you state that if they were given first runs they would dilute the patronage of the downtown, Hollywood and Wilshire district theatres by some 50%. The statements above referred to on pages 23, 29 and 34, unless clarified will be used in a manner which I am sure Your Honor did not intend. The theatres in the suburban areas are not *as* competitive to the metropolitan theatres as are the theaters in the urban core; therefore, the distributors feel justified in granting the suburban area theatres an earlier availability (*i.e.*, 7 or 14 days) they they grant to theatres in the urban core (*i.e.*, 21 days). If it could be said that the theatres in all these suburban areas were not at all competitive with the big metropolitan theatres, then it might be argued that the distributors would not be justified in granting the big metropolitan theatres any clearance over those suburban areas, a position contrary to that taken by both plaintiff and defendants. You will recall that both Mr. Arthur and Mr. Marco contended that the big metropolitan theatres are entitled to clearance over the entire County of Los Angeles, with the exception of Pomona and Long Beach, and conceded that there was competition sufficient to support such clearance. It would save much confusion if your statements at pages 23, 29 and 34 could be clarified by indicating, not that the suburban areas are wholly non-competitive with the big metropolitan theatres, but by indicating that the suburban areas are not as competitive with the big metropolitan theatres as are the theatres in the urban core.

3. There seems to be some confusion in the dates set forth on page 25. The correct dates are as follows:

Decree	*Date*
Opinion of statutory court	June 11, 1946
First decree of statutory court	December 31, 1946
Opinion of Supreme Court ordering reconsideration by statutory court	May 3, 1948
RKO consent decree	November 8, 1948
Paramount consent decree	March 3, 1949
Second statutory court decree against all defendants except Paramount and RKO	February 8, 1950
Supreme Court decision affirming second statutory court decree	June 5, 1950

4. In footnote 36 at page 31, you correctly refer to the case entitled *"Paramount Pictures Theatres Corporation* vs. *Partmar Corporation"* in which Judge Westover rendered his opinion. On Page 19, both in the text of your opinion and in Footnote 24, the plaintiff in that case is incorrectly referred to as Paramount Pictures Corporation. In that connection, your opinion indicates at pages 19 and 31 that Judge Westover held that the franchise in favor of Partmar was an exclusive franchise, whereas it is our understanding that Judge Westover held that this particular franchise was non-exclusive, although he does indicate in his opinion that exclusive franchises are not illegal.

5. On page 22 of your opinion, San Pedro and Wilmington are described as being distinct municipalities. My understanding is that these two areas are legally a part of the City of Los Angeles, although they certainly possess the distinct characteristics that you point out.

6. At page 12 of your opinion, in the first paragraph, the statement is made that the parties to the two consent decrees (RKO and Paramount) were not parties to the original action. Both RKO and Paramount were parties to *U. S.* vs. *Paramount* from the time of the commencement of that action until the dates when the respective consent decrees were entered.

Respectfully submitted,

HOMER I. MITCHELL.

HIM/MGM
Enclosure

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IN THE

Supreme Court of the United States

October Term, 1954.
No. 425.

FANCHON & MARCO, INC.,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Statement of the Case.

Petitioner's "Statement of the Case" is at variance with the evidence and with the findings of the trial court. By misstatement of some facts, by only partial statement of others, and by lifting statements of the trial court out of context, petitioner's Statement of the Case creates an entirely erroneous impression of the record. For that reason, respondents deem it necessary to set forth the following statement of the case which faithfully reflects the facts of record.

Petitioner was the operator of a circuit of theatres,—3 in Los Angeles and 25 in St. Louis. It was closely

associated with corporations which operated 13 other theatres in and about Los Angeles. Petitioner and those corporations had officers, directors and stockholders in common and were represented by the same individuals in the licensing and booking of pictures. [Exs. A and B; R. 805, 384, 386, 783-784, 787, 986, 1098, 3287-3291, 3648-3650.]

Respondents (using the names under which they are commonly known) are Paramount, Loew's, RKO, Universal, United Artists, Twentieth Century-Fox and Fox West Coast. Neither Columbia nor Warner Bros. was a party to this action at the time of trial.

On August 10, 1949, petitioner opened the Baldwin Theatre. The Baldwin is a neighborhood theatre in a new subdivision project on the northerly slopes of the Baldwin Hills, an undeveloped area near the fringe of the urban core of Los Angeles.[1] There are a few business establishments in the vicinity of the Baldwin—a market, some small shops and a drive-in-restaurant—but there is also much vacant property in the area. [R. 2875-2878, 2900, 2904-2905, 2918-2919, 2555, 2457, 3259-3260, 2877, 2915; Ex. 29A; R. 1187; Court's Ex. 1; R. 423.]

Licensing of first runs: Petitioner states that the trial court found that the distributors uniformly and unani-

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[1]Petitioner states that the Baldwin Theatre is "located nearer the center of the area population than any other theatre." (Pet. 8.) That statement is not supported by evidence and even if it were it would not qualify the Baldwin to play a showcase first run policy. The center of population of the United States is 8 miles north/northwest of Olney, Illinois (1954 World Almanac). A theatre in the wheatfields outside of Olney would no more be qualified to play a showcase first run than would the Baldwin, located on the edge of urban Los Angeles adjoining hundreds of acres of uninhabited property.

mously limited first runs "to their controlled theatre corporations" and that the same control of those corporations that existed during the period of the government case continued to exist during the period laid in the complaint. (Pet. 11, 13.) Both the trial court's findings and the evidence are to the contrary.

The evidence clearly shows how each distributor, acting individually, licensed its pictures first run since the opening of the Baldwin Theatre and why it followed a particular practice.

Since prior to 1942 petitioner itself has operated the Downtown Paramount Theatre and the Hollywood Paramount Theatre.[2] During the period involved in this action every Paramount picture, with one exception, was exhibited first run by petitioner itself exclusively in those two theatres.[3] [Ex. Z-1; R. 2311, 181-182, 781, 782, 382-383.]

Except for the first few months after the opening of the Baldwin Theatre, respondent Loew's licensed all of its pictures first run during the period involved in this

---

[2]Prior to December 31, 1949, respondent Paramount had an ownership interest in these two theatres, but they were operated by petitioner and respondent Paramount had no control over them. On December 31, 1949, respondent Paramount's ownership interests in those theatre properties were transferred to United Paramount Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [R. 2381.]

[3]Petitioner states that it operated those theatres "subject, however, to the many restraints and discriminations described in the Paramount case." (Pet. 7.) That statement is unsupported by any evidence. The fact is that petitioner had a highly advantageous valid franchise from Paramount by which it was guaranteed to receive a steady flow of first run pictures in its two showcase theatres consisting of substantially all of the pictures distributed by Paramount. (*Partmar Corporation v. Paramount Pictures Theatres Corp.*, 347 U. S. 89 (Feb. 8, 1954).)

action to theatres operated by one or more of the following independent exhibitors: United Artists Theatres Circuit,[4] Metropolitan Theatres Corporation, Galston & Sutton and Sherill Corwin. All these exhibitors were unaffiliated with any distributor. Their first run theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. [Ex. Z-2; R. 2314, 3108-3109, 3262, 3116, 767-769.]

During the period involved in this action RKO licensed most of its pictures first run to the RKO Hillstreet in Downtown Los Angeles and the Pantages Theatre in Hollywood. Both of these theatres were operated by RKO until December 31, 1950, at which time they were transferred to RKO Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [Ex. Z-3; R. 2316, 3297, 3316-3317.]

During the period involved in this action Universal licensed its pictures first run to the United Artists Theatre in Downtown Los Angeles and to theatres in Hollywood and the Wilshire District. It also licensed pictures to the Studio Theatre near Universal City, and sometimes to the Culver Theatre in Culver City. Since December, 1949, the United Artists Theatre has been operated by United Artists Theatres Circuit, an independent. The other theatres (and the United Artists Theatre prior to December, 1949) were operated by Fox West Coast, a subsidiary of Twentieth Century-Fox. [Ex. Z-4; R. 3402-3404, 3107, 3116, 3495, 1460.]

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[4]United Artists Theatres Circuit never has had any connection with respondent United Artists Corporation. Since November, 1949, it has been an independent unaffiliated operator of a circuit, just as petitioner is an independent unaffiliated operator of a circuit. [R. 3495.]

Prior to May, 1950, respondent United Artists (not connected in any way with United Artists Theatres Circuit) licensed its pictures first run in four theatres operated by an independent exhibitor unaffiliated with any distributor. These theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. In May, 1950, this independent exhibitor changed its policy and was no longer desirous of playing United Artists pictures first run. Thereafter United Artists obtained first run playing time in whatever theatres it could interest in its pictures in Downtown Los Angeles and Hollywood. A number of its pictures were licensed first run to the Downtown Paramount and the Hollywood Paramount, operated by petitioner. [Ex. Z-5; R. 2318, 3530-3534, 3495, 767-769, 2198, 3502-3504.]

Respondent Twentieth Century-Fox, to which the judgment of February 8, 1950, in *United States v. Paramount* was applicable, exhibited its own pictures first run in the theatres operated by Fox West Coast, its wholly-owned subsidiary. Its right so to license its pictures was expressly recognized and reserved to it in that judgment. Paragraph V of the judgment of February 8, 1950, stated:

> "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all of the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as

may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries." [Ex. 48.]

It is not a fact that first runs were confined to theatres operated by subsidiaries or affiliates of distributors. Many first runs were licensed to independent exhibitors.

Reasons for licensing first runs in Downtown Los Angeles, Hollywood and sometimes the Wilshire District: All of the distributors licensed their first runs to theatres in the Downtown and Hollywood areas of urban Los Angeles. Some, but not all, of the distributors, such as Twentieth Century, Universal and Loew's for a time, regarded the Wilshire District as being of such importance as an urban center that they sought an additional first run outlet in the Wilshire District. [Ex. Z-2; R. 2314; Ex. Z-4; R. 2317, 1218-1219, 812-814.]

The two great centers of urban Los Angeles are Downtown Los Angeles and Hollywood. [R. 2878-2880.] The geographical and population characteristics of Los Angeles and the importance of that city in the motion picture world make it essential that every distributor show its pictures first run in these two great urban centers. There was no dispute about this. Marco Wolff, Vice-President of petitioner, testified that it was good business practice to exhibit pictures first in Downtown Los Angeles and on Hollywood Boulevard. [R. 818-819.]

The reasons for playing pictures first run in the Downtown and Hollywood areas are fully set forth in the evidence. [R. 2371-2372, 2378-2379, 2627-2628, 3125-3126, 3297-3298, 3407.] The theatres in those areas are located in great business and shopping centers. These

centers, with their important stores, fine hotels and restaurants, intriguing window displays and bright lights, generally attract crowds. There is much pedestrian traffic passing them. [R. 3126.] They are able to operate matinees, as well as evening performances because these important shopping centers attract large daytime crowds that drop in to the theatres for the matinee. [R. 2376-2377.] That is the reason there are so many theatres, most of them of a deluxe character, clustered in these two areas.

The persons who patronize the Downtown Hollywood and Wilshire District theatres come from all parts of the Los Angeles metropolitan area and if a picture is well attended in the large deluxe theatres in those urban centers, its reputation spreads by word of mouth throughout the entire area. [R. 2428, 3298.] Thus, as the picture plays through successive runs, thousands of patrons will be waiting to see the picture in their neighborhood houses at lesser prices and at more convenient times, their interest having been stimulated by the "showcase" exhibitions in the great Downtown and Hollywood theatres. In order that the "showcase" runs may be successful (and thus "establish" the picture for subsequent runs) large sums are expended by the distributors for advertising, sometimes in excess of the returns received from the "showcase" exhibitions. [R. 2371, 3230.]

There are other reasons why it is essential that first runs be played Downtown and in Hollywood. The Los Angeles area is the motion picture capital of the world. The first run showings here are "covered" by columnists and feature writers whose observations and reviews are published nationally. Unless the first run showings are well attended and successful, adverse publicity on a na-

tional scope might follow. And, to the contrary, successful first runs in this area command favorable publicity on a national scope. [R. 2371.]

Furthermore, the showcase theatres pay large film rentals and they can afford to pay such rentals because they have the right to play the first runs with clearance over other theatres in the competitive area. [R. 2371.] All of Los Angeles County, except the Long Beach-Wilmington-San Pedro area and the Pomona area, is competitive, on a first run basis, to Downtown Los Angeles and Hollywood. That is to say, people from all of Los Angeles County (with those exceptions) attend the great showcase theatres in the two principal metropolitan entertainment centers, Downtown Los Angeles and Hollywood. [R. 2435-2436.] There may not be great numbers from any one area of the county, but altogether the suburban areas contribute a substantial portion of the patronage of the showcase theatres. [R. 3244-3245.] Petitioner's answers to interrogatories and Marco Wolff's testimony are in accord with these statements. [R. 3652, 904-907.] It is a principle of economics in the business of distributing motion pictures recognized by all (including Marco Wolff) that the earlier the run, the greater the area of competition. [R. 907.] Thus, the area of competition for first run is almost county-wide whereas the area of competition for subsequent runs is smaller. [R. 907, 916-918.] The result of these "facts of life" in the business of distributing motion pictures is that the licensing of additional first runs in the competitive area tends to dilute the patronage of the "showcase" theatres, which in turn, decreases their ability to pay large film rentals and to contribute toward

the extensive advertising and exploitation a picture receives on its first release.

It was for these, and other valid business reasons thoroughly demonstrated by the evidence, that the majority of the distributors, acting individually, required that their pictures receive first run exhibition in the Downtown and Hollywood areas (and on occasion in the Wilshire area) and refused to dissipate their value by exhibiting them on that run in neighborhood theatres.

Licensing of subsequent runs: Since 1945, the date as of which the findings were made in *United States v. Paramount* after remand (Findings of Feb. 8, 1950, [Ex. 47; R. 1595]), there have been many changes in the methods of the respective distributors in distributing motion pictures in the Los Angeles area. Not only have first runs been frequently licensed to independent exhibitors, but the method of licensing subsequent runs has undergone profound changes. If there ever was a fixed system of runs and clearances in the Los Angeles area, it had ceased to exist by the time petitioner's Baldwin Theatre opened on August 10, 1949. Each of respondent distributors acting individually, has made its subsequent run pictures available to any theatre which desired them, regardless of past relationship or ownership. [Ex. AW, R. 2637; Ex. AX, R. 2653; Ex. AY, R. 2654; Ex. BR, R. 3381; Ex. BU, R. 3417; Ex. BI, R. 3129; R. 2469-2472, 2637-2662, 3317-3319, 3380-3381, 3417-3422.]

Changes in theatre ownership of Fox West Coast: With respect to the theatre ownerships of respondent Fox West Coast, the record shows that numerous changes occurred between 1945 and the date of the opening of the Baldwin Theatre. Between December 31, 1946, the date

of the trial court's first decision in *United States v. Paramount* [R. 3074, Ex. BG], and the date of trial in the case at bar, the number of Fox West Coast theatres in Los Angeles County was reduced from 131 to 91, a reduction of about 33%. The trial court was sufficiently impressed with the diminution in size, power and number of theatres operated by Fox West Coast following the divestiture orders in the decree of December 31, 1946, that he devoted several pages of his opinion to this evidence. [R. 158-162.]

Clearance of first runs over subsequent runs: Petitioner states that by a "conspiratorial process of classification" (Pet. 10) the Baldwin was licensed to play on a 21-day clearance after close of Downtown Los Angeles. Both petitioner's and respondents' witnesses testified that a clearance of 21 days for the Baldwin was reasonable; the evidence on this subject was uncontradicted.

Petitioner constructed its Baldwin Theatre within the urban core area of Los Angeles, from which area the showcase theatres may be expected to draw their greatest patronage. The earliest availability after first run afforded any of the theatres in that area, a number of which are larger and as fine as the Baldwin, is 3 weeks or 21 days. Every distributor offered the Baldwin such availability, equivalent to the best offered other theatres in the same urban area whether operated by Fox West Coast or by independents. Harry Arthur, Jr., President of petitioner, admitted that a 21-day clearance for the Baldwin Theatre was "not unreasonably long." It was his view that even a longer clearance in favor of the first run theatres would be reasonable. His testimony is quoted in the trial court's opinion [R. 153-156] and can also be found in the Transcript. [R. 3548-3555.] Marco Wolff,

Vice-President of petitioner, also conceded that a 21-day clearance as to the Baldwin was reasonable. [R. 911-913.]

The trial court found in accordance with this testimony that the 21-day availability was reasonable. [Finding 25; R. 193.]

Findings of no conspiracy: There were differences in the detail of distribution by the several distributors, but fundamentally, they were confronted with the same problems and fundamentally their respective reactions were similar. The trial court found that these similarities were not the result of conspiracy or agreement, but were "the result of each distributor defendant meeting, on economic and other reasonable grounds, similar situations in a similar manner." [Findings 15, 22 and 26; R. 187, 192, 194.]

Upon a consideration of all of the evidence introduced, including the decrees in *United States v. Paramount,* the trial court found (speaking as of May 3, 1948 and thereafter) [R. 172] that there was no conspiracy in the licensing of first runs in Los Angeles [R. 186], that none of the respondents maintained a fixed system of runs or clearances [R. 193], that constant changes were made in the availabilities and clearances of theatres [R. 193], that the run and clearance accorded the Baldwin was not the result of any conspiracy [R. 194], and that all determinations made by respondents with respect to the Baldwin were made individually and without conspiracy. [R. 195.]

The Court of Appeals said,

> "The elaborate findings of fact have been reviewed, and there is no one of them which is clearly erroneous. Indeed, on the record, the court affirms all the findings." (Pet. Appendix 34.)

ARGUMENT.

This case was before the court during the 1952 Term (No. 708) on petitioner's attempt to obtain review here prior to decision in the Court of Appeals. This court denied certiorari. (345 U. S. 964.) Petitioner now seeks review of substantially the same questions as were presented by the petition filed and denied during the 1952 Term.

I.

The Decision of the Court of Appeals Turns Upon an Analysis of the Particular Facts of This Case.

Twice during the course of its opinion, the Court of Appeals correctly emphasized that "the appeal relates entirely to questions of fact." (Pet. Appendix 35, 38.) Nevertheless, the Court of Appeals "reviewed the long and complicated record with extreme care because of the questions of fact so raised." (Pet. Appendix 39.) At the conclusion of its opinion affirming the trial court, the Court of Appeals said, ". . . we do not believe an appellate court, already burdened, should have been required to pass on such questions." (Pet. Appendix 39.)

Examination of the opinion and briefs in the Court of Appeals shows that the arguments relied upon there are basically the same ones urged as ground for review here. The crux of the case is whether there was a conspiracy in the licensing of motion pictures in Los Angeles in 1949 to 1951. The trial court (Yankwich, J.) found that there was no conspiracy at all during the period laid in the complaint. The Court of Appeals not only expressly confirmed this finding and all others but remarked that ". . . we do not think the appeal on the facts and the weight of the evidence in this case from an able and experienced

judge who has had experience in the area was justified." (Pet. Appendix 34, 39.) The petition for certiorari is is a further attempt to overturn the factual determination.

As in the court below, petitioner contends that the trial court erred in failing to find that the *prima facie* evidence supplied by the introduction into evidence of the decrees in *United States v. Paramount* outweighed the oral and documentary evidence which showed that there was no conspiracy in the licensing of motion pictures in Los Angeles in 1949 to 1951. This contention only serves to emphasize the essentially factual nature of the questions presented for review here. As this court said in *Theatre Enterprises,* "the Paramount decrees, even if admissible, were only *prima facie* evidence of a conspiracy covering the area and existing during the period there involved" (346 U. S. 537, 541). The complete answer to petitioner's attempt to invite review here by raising questions concerning the Paramount decrees is contained in the following statement of the Court of Appeals:

> "The trial court clearly stated the rule of the statute and gave these decrees and judgments the effect of *prima facie* evidence in favor of appellant as though it had been a party thereto, but properly found under the evidence as a whole that the presumption was rebutted and that appellees were not at the time conspiring to discriminate against the Baldwin or appellant." (Pet. Appendix, 36.)

The petition in this case falls squarely within the principle that, "Granting of the Writ would not be warranted merely to review the evidence or the inferences drawn from it." *General Pictures Co. v. Electric Co.,* 304 U. S. 175, 178. See also, *Labor Board v. Waterman S. S. Co.,* 309 U. S. 206, 208. This is especially so

where, as here, the findings of fact made by the district court have been expressly confirmed by the Court of Appeals. In that situation, this court has often held that

> "a court of law, such as this court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (*Graver Mfg. Co. v. Linde Co.,* 336 U. S. 271, 275, and cases cited.)

II.

There Is No Conflict of Decision.

The only conflict of decision urged by petitioner is with *United States v. Paramount,* 334 U. S. 131. The alleged conflict is based on the holding of the Court of Appeals that the District Court was correct in finding that there was no conspiracy in Los Angeles in 1949 to 1951. It is clear that this holding is not in conflict with the *Paramount* decision. As this court has pointed out, the *Paramount* case had reference to conditions in the year 1945[5] and, moreover, did not adjudicate that a conspiracy as to runs and clearances existed in Los Angeles or any other particular area. *Theatre Enterprises, Inc. v. Paramount,* 346 U. S. 537, 543.

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[5]Petitioner contends that by reason of Finding 158 dealing with evidence after remand of the case, "The findings in the *Paramount* case reflect the conditions existing as late as February, 1950." (Pet. 23.) Petitioner fails to point out that Finding 158 expressly provides that the evidence submitted after remand "has been used by the Court in making its findings as to the situation in 1945." [Ex. 47; R. 1605.]

Furthermore, the evidence in this case shows that if there ever was a conspiracy with respect to the distribution of motion pictures in Los Angeles it had ceased by the time the Baldwin opened in 1949. The above Statement of the Case shows that at least as early as 1948 profound changes occurred in theatre ownership and operation and in distribution practices. Commencing at least as early as 1948, constant changes were made in the runs and clearances of theatres, properly located independent theatres were licensed many first runs, and subsequent runs were made available to exhibitors regardless of theatre ownership, including the Baldwin, upon clearances which petitioner's own officers conceded were reasonable.* The trial court summarized these changes in its opinion and in its findings. [R. 173-176, 193; 100 F. Supp. 84, 95, 96, 97, 103.] Remarking on these changes, the trial court said:

> "Whatever may have been the practice of the defendants before the decree of the statutory court, it is quite evident that since then, and the entry of the consent decrees, there has been an abandonment of the condemned distributing policies, such as 'zoning,' 'block-booking,' 'key' deals, and the like, a revision of clearances and the establishment of a system of picture-by-picture exploitation." (100 F. Supp. at 95.)

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*Although petitioner refers to admission price-fixing (Pet. 10, 22, 31), no issue was tried with respect thereto. The Court of Appeals said:

> "No allegation of an attempt to fix prices is made in the complaint. And, in response to questions from the court on oral argument, counsel for appellant admitted this is not a case based upon price fixing." (Pet., Appx. 36, note 5.)

III.

The Decision of the Court of Appeals Is Clearly Correct.

1. There Is No Presumption That the 1945 National Conspiracy Continued in Defiance of the Court's Injunction. But Even If There Were Such a Presumption, It Was Overcome by Substantial Evidence That in 1949 to 1951 Respondents Were Not Engaged in Any Conspiracy in Los Angeles.

Petitioner argues that "a conspiracy, once established, is presumed to continue until the contrary is shown." (Pet. 25.) In the cases cited by petitioner[7] there were no injunctions requiring the defendants to cease the conspiracy. Petitioner's cases hold that *where there is evidence of a continuing conspiracy* (there being no decree enjoining the conspiracy), it will be presumed that a person once found to be a conspirator, *continues as a conspirator* in the absence of evidence to the contrary.

Where as in the case at bar, there is a decree enjoining the *continuance* of a conspiracy, there is no presumption that the conspiracy will be continued in defiance of the court's order. To the contrary, there is a presumption that the court's order will be obeyed. In *Cooper v. Dasher,* 290 U. S. 106, 110, speaking of a court's order, Mr. Justice Cardozo said, "We are not to presume that the order will be flouted." The same is true of orders enjoining conspiracies in violation of the antitrust laws. (*Timken Roller Bearing Co. v. U. S.,* 341 U. S. 593, 604; *Bigelow v. RKO,* 205 F. 2d 231, 233 (7th Cir.

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[7] *Marino v. United States,* 91 F. 2d 691, 695 (9th Cir. 1937). *Coates v. United States,* 59 F. 2d 173, 174 (9th Cir. 1932). *Hyde v. United States,* 225 U. S. 347, 369.

1953).) See also, *N. L. R. B. v. Lightner Pub. Corp.*, 128 F. 2d 237, 240 (7th Cir. 1942) where the court applied the presumption that an injunctive decree has been obeyed.

Even if there were a presumption that the 1945 conspiracy continued, such a presumption would, at best, constitute only a conflict of evidence which was overcome by substantial evidence that there was no conspiracy in 1949 to 1951 in Los Angeles. Furthermore, the decrees in *United States v. Paramount* could not have been *prima facie* evidence of a conspiracy as to runs and clearances in Los Angeles for the decrees did not adjudicate a conspiracy as to runs and clearances in any particular area. *Theatre Enterprises, Inc. v. Paramount,* 346 U. S. 537, 543.

2. The Testimony of the Executives Who Determined the Run Which Their Respective Companies Would License to the Baldwin Constituted Substantial Evidence of No Conspiracy.

On the issue of conspiracy, respondents introduced evidence explaining why each respondent distributed pictures in the manner shown by the evidence and denying that the manner of distribution followed was the result of conspiracy. This testimony constituted substantial evidence from which the District Court could find, as it did, that there was no conspiracy. Petitioner challenges this finding, claiming that "The men who made the denials were, as to licensing motion pictures, hardly more than glorified correspondence clerks." (Pet. 28.)

Petitioner's statement is contrary to the evidence. For Paramount, Loew's, RKO, Universal and Twentieth Century-Fox, the Western Sales Managers testified. They were the executives in charge of distribution in the West-

ern States. Two had their headquarters in New York; the other three had their headquarters in Los Angeles. These executives not only were the executives who knew why the particular distributor licensed pictures as it did in the Los Angeles area; they were the men who decided what availability should be accorded to the Baldwin. They testified why they had reached their decisions and the reasons given by them had nothing to do with conspiracy or agreement. They were business reasons—reasons which grew out of the obligations imposed by the decisions in *United States v. Paramount* and out of the economics of the distribution of motion pictures as applied to the geographical situation, population habits and physical facts in the Los Angeles area. In some instances the decisions of these executives were subject to approval of lawyers and other executives. But in no instance was the judgment of the other executives substituted for the judgment of the executives who had studied the situation, knew the facts and reached a considered conclusion as to what his company should do.[8] These executives denied joint action.

But more persuasive than these mere denials are the reasons which they gave for their decisions and the correspondence written before there was any lawsuit, which show beyond any reasonable doubt that the determinations

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[8]These statements made by petitioner are not supported by evidence: That "all decisions as to granting licenses for first run" were made "by company officials at the home office in New York City" (Pet. 12, 13); that "the function of the Los Angeles representative was merely to transmit to petitioner the denials decided upon in New York" (Pet. 13); that "as few as five men in New York * * * did determine to whom pictures should be furnished in Los Angeles and upon what basis as to run, availability and otherwise." (Pet. 27.)

made by the respective distributors as to the playing position to be accorded the Baldwin were made individually, in each instance, for legitimate and even compelling business reasons. Their whole course of conduct and the legitimacy and reasonableness of the decisions which they reached show beyond any reasonable doubt that combination, conspiracy, and agreement were not involved.

The decision in *Interstate Circuit v. United States,* 306 U. S. 208, has no application to the case at bar. There, Interstate Circuit made most extraordinary demands upon the branch managers of the distributor-defendants. These demands were not considered or acted upon by the branch managers, but were referred to executives for decision. The distributor-defendants uniformly agreed to the demands and from this uniformity in what was considered an unreasonable position, the lower court inferred conspiracy. Defendants did not offer any explanation of "the singular unanimity of action on the part of the distributors" (p. 223). No one who had anything to do with the distributors' decisions on the Interstate Circuit demands was called as a witness. The Supreme Court held that *in the absence of any reasons* why the defendants, acting individually, would unanimously agree to such extraordinary demands as were presented by Interstate Circuit, the trial court was justified in inferring that defendants acted by agreement and that this inference was supported and strengthened by the fact that the distributors failed to call any witness who knew, or was in a position to know, whether any agreement had been reached among them for concerted action (p. 225). In the case at bar, the reasons for the individual acts of the distributors were fully explained by executives who made the decisions.

The decisions in *Milgram v. Loew's*, 192 F. 2d 579, 584 (3rd Cir. 1951) and *Local 167 v. United States*, 291 U. S. 293, 298, cited by petitioner, are not in point. The fact that the court in the *Milgram* case was not persuaded by defendants' denials of conspiracy in an entirely different factual situation and that in the *Local 167* case an unfavorable inference was drawn from the failure of conspirators to testify does not indicate that the trial court and the Court of Appeals erred in finding no conspiracy in the case at bar.

3. The Trial Court Did Not Make an Erroneous Application of the Rule of Reason.

Petitioner states, "A conspiracy to refuse to license pictures to petitioner for first run use in the Baldwin theatre is unlawful in and of itself, and the reasonableness of the conspiratorial refusal on the ground of necessity or on so-called economic and business grounds is immaterial" (Pet. 29). The decisions of the trial court and the Court of Appeals in the case at bar are not in conflict with the above quoted contention of petitioner. They neither adopt nor repudiate that principle. The trial court found that there was no conspiracy at all to refuse to license first run pictures to the Baldwin. [R. 186-188; 192-196.] The Court of Appeals confirmed those findings. (Pet. 34.) In view of the findings of no conspiracy, it was unnecessary to decide and the trial court and Court of Appeals did not decide whether a conspiracy to refuse to license first run pictures to the Baldwin would be a reasonable restraint of trade.

The question of the reasonableness of the business conduct of respondents was material to the question of whether the individual license contracts constituted rea-

sonable restraints of trade. Clearances between runs of theatres in substantial competition, when not unduly extended in duration, are not unlawful: *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 145-147.

The reasonableness of the business conduct of respondents was also material to the question of whether similarity of action with respect to the Baldwin was a proper basis for an inference that such similarity resulted from conspiracy. As in *Theatre Enterprises, Inc. v. Paramount*, 346 U. S. 537 (the facts in which are almost identical to the facts in the case at bar), the respondent distributors refused to license first runs to a neighborhood theatre and instead licensed them to the big deluxe downtown "showcases." This Court held, in *Theatre Enterprises*, that conscious parallel business behavior was not itself a Sherman Act offense. On the question of whether conspiracy should be inferred from similar action, the reasonableness of the similar action was material for if the similar action is of a reasonable character, the court can properly infer that it was the result "not of previous agreement, but of solving an identical situation in a similar manner." [100 F. Supp. 84, 91; Finding 15, R. 187-188.]

At pages 29 and 30 of the petition, petitioner lifts two statements of the trial court out of context thus giving an entirely erroneous impression of the Court's viewpoint. First, petitioner quotes the statement, "No cases exist which hold that the system, in itself, is a violation of the antitrust laws" as if the trial court were referring to a conspiracy to refuse to license pictures to a particular theatre. Read in context, what the trial court said was that the method or system of licensing

pictures in successive runs with clearances between runs was not itself unlawful. At no time did the trial court say that a conspiracy to refuse pictures to a particular theatre was lawful.

Second, petitioner lifts out of context a statement of the trial court characterizing the antitrust laws as "a part of America's romantic dream." Read in context, the trial court's statement was as follows:

> "So the trouble with these articles is they are by young men who are not economists, who are lawyers, and they get mixed up in the economic details, which some of them do not understand. Chamberlin and all the others actually condemn the antitrust law, as interpreted, just as your Professor Toulmin does. But I am not interested in the theory of economists. I am interested in the way the Supreme Court has interpreted it.
>
> "As a matter of fact, I can point to an article of my own, published in the Commercial Law Journal, in which I said that antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern industrial system. You can quote me against myself. But, as I told you, after 5:00 o'clock I can talk one way, but up to 5:00 o'clock I conform to what the law tells me to do." [R. 3978.]

As a matter of fact, the trial judge, Leon R. Yankwich, Chief Judge of the Southern District of California, has had long experience in the antitrust field. He was a member of the committee of judges appointed by the Judicial Council of the United States to study and report on Procedure in Antitrust and Other Protracted Cases.

(13 F. R. D. 62.) He has decided many important cases involving the antitrust laws, including the following:

United States v. Standard Oil Co., 78 F. Supp. 850, affirmed 337 U. S. 293 (1948);

United States v. Richfield Oil Corp., 99 F. Supp. 280, affirmed 343 U. S. 922 (1951);

Balian Ice Cream Co. v. Arden Farms Co., Inc., 94 F. Supp. 796, 104 F. Supp. 796 (1950);

F. & A. Ice Cream Co. v. Arden Farms, 98 F. Supp. 180 (1951);

United States v. Food and Grocery Bureau of Southern California, 43 F. Supp. 974, affirmed 139 F. 2d 973 (1942);

United States v. Heating, Piping & Air Conditioning Contractors Association, 33 F. Supp. 978 (1940).

Petitioner has lifted a number of other statements of the trial court out of context to give an entirely erroneous impression of what the trial court said. For example, petitioner quotes the trial court as saying, "I will admit monopoly . . . So what? What does that mean?" [R. 2238.] Judge Yankwich was referring to petitioner's attempt to prove monopoly prior to 1945 and was saying that it was of little or no significance what the situation was in 1945; that the material question was what the situation was in 1949 to 1951, the period laid in the complaint.

An examination of the record as a whole will demonstrate that Judge Yankwich fairly and correctly applied the law to the facts and that his comments thereon were wise and appropriate. We submit that the implications created by petitioner's use of the trial court's comments out of context are unfair.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 425

FANCHON & MARCO, INC., *Petitioner*,

v.

PARAMOUNT PICTURES, INC., ET AL., *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

QUESTIONS OF LAW

Petitioner's grievance is not, as is argued by respondents (Brief, pp. 12-13), that in the decisional process the trial judge weighed the evidence pro and con, and decided the case against petitioner solely on questions of fact; and therefore the appeal related entirely to questions of fact. Petitioner's complaint is precisely the opposite: (1) that in the decisional process the facts shown by petitioner's evidence were eliminated from consideration by a supposed rule of law; (2) that those facts were deemed to

have been rebutted by testimony of incompetent witnesses which was totally without any probative value; and (3) that those facts were held to be insufficient for recovery by petitioner because of another supposed rule of law. Substantial and important facts were eliminated (1) by a presumption erroneously supposed to be required by law that the matters shown by the judgment in the Paramount case, which were received by the district court without limitation or reserve, terminated upon entry of the judgments, even though by the express terms of the judgments termination of the unlawful acts and conditions was postponed for a long time to come; other substantial and important facts were deemed to have been rebutted (2) by the testimony of four witnesses, who had no knowledge or participation, that they personally had no discussions with others about the denial of pictures for petitioner's theatre; and all of the facts were held to be insufficient (3) because of a supposed rule of law that petitioner could recover only by proving that the refusals of pictures were unreasonable as well as conspiratorial and injurious.

As there is no such presumption as that used by the district court; as there is no rule that conspiratorial refusals to furnish pictures are not unlawful unless also unreasonable; and as any factual decision based on the incompetent testimony, was clearly erroneous as a matter of law—the decisional process was wholly vitiated and petitioner was deprived of its right to have the court reach a decision by a consideration and weighing of the evidence pro and con, unaffected by such supposed rules and incompetent evidence.

FIRST RUNS ONLY FOR FILM COMPANY THEATRES

Respondents not only deny that first run pictures were limited to theatres affiliated with them and other defendants in the Paramount case, but assert that many first run pictures were licensed by them to independent

exhibitors, and that Loew's licensed "all" of its pictures first run to one or more "independent" exhibitors, who are named in the brief as (1) United Artists Theatres Circuit, (2) Metropolitan Theatres Corporation, (3) Galston & Sutton and (4) Sherill Corwin. (Brief in Opposition, pp. 3-4, 6, 9, 15.) The brief contains citations only for the statement that Loew's licensed "all" of its pictures for first run to the four exhibitors named. Examination of the exhibit and the record places cited, discloses no reference whatever to furnishing first run pictures to independents.

The evidence shows that up to the time of trial in 1951 a severely restrictive condition as to first runs had long existed in the Los Angeles area. Although during at least ten or twelve years preceding the trial, the Los Angeles population increased and spread over the area by leaps and bounds—almost one million people in ten years—with one possible exception, no new proprietor had been able to enter the first run exhibition business in the area.

Twelve years prior to the trial there were thirteen first run houses in Los Angeles, with six owners. At the time of the trial there were thirty-three first run theatres, with only one new owner. (R. 499-501, 574-581, 3105-3109) The new owner was United Artists Theatre Circuit, whose president is the brother of the president of Fox West Coast Theatres, and of the president of Twentieth Century-Fox Film Corporation. (R. 502-503) Sixteen or seventeen of the first run theatres added during the twelve years, were operated by respondent Fox West Coast Theatres, and the other two by Warner. At least eleven of the additional Fox first run theatres were acquired by Fox from independents. When operated by the independents the theatres were restricted to second or later runs but when acquired by Fox, were promptly moved into the first run rank. (R. 518-523, 540-548) The eleven theatres are as follows:

1	Studio	880 seats
2	El Rey	861 "
3	Los Angeles	2097 "
4	Guild	965 "
5	Belmont	842 "
6	Fox Wilshire	2296 "
7	Ritz	
8	Uptown	1715 "
9	Four Star	900 "
10	Globe	782 "
11	Vogue	897 "

Conversely, every independent exhibitor who sought pictures from respondents and the other defendants in the Paramount case for first run use, was refused. The following nine independently operated theatres are named in the evidence as having been refused first run by every major company to which they applied, five of them being large, newly constructed, modern theatres:

Baldwin	1800 seats
Pickwood	1650 "
La Tijera	1500 "
Paradise	1300 "
Imperial	
Campus	850 "
Bard's Adams	1400 "
Manchester	1668 "
Leimert	1185 "

(R. 2412, 2414, 2416, 2423, 3147, 3231, 3280, 3374-3375, 3466-3467; Exs. AL, AM, AN, AO, AP, AQ, AR.)

The only variation from unanimous downright refusal to the independents was an offer of RKO to receive bids from the independents against the Fox West Coast Culver theatre, but only on pictures not desired for first run use at the RKO houses. (R. 3374)

That first run pictures were refused for the Baldwin theatre because it was remotely located, as is intimated in respondents' brief (p. 2), is not correct. The map on page 7 shows the locations of the Baldwin and the thirty-

three first run theatres as of the time laid in the complaint. It shows that the Baldwin was as near to the Los Angeles civic center as five of the first run theatres, and nearer than seven.

The theatres appearing on the map are:

1. Baldwin

Fox West Coast Theatres

2. Belmont
3. Carthay
4. Chinese
5. Culver
6. El Rey
7. Fine Arts
8. Wilshire
9. Globe
10. Guild
11. Iris
12. Los Angeles
13. Loyola
14. Orpheum
15. Ritz
16. Studio
17. Uptown
18. Vogue

Other Vertical Combination Theatres

19. Music Hall
20. Music Hall
21. Music Hall
22. Music Hall
23. Egyptian
24. Forum
25. Four Star
26. Loew's State
27. Pantages
28. RKO Hill Street
29. United Artists
30. Warner
31. Warner
32. Wiltern

Independent Theatres

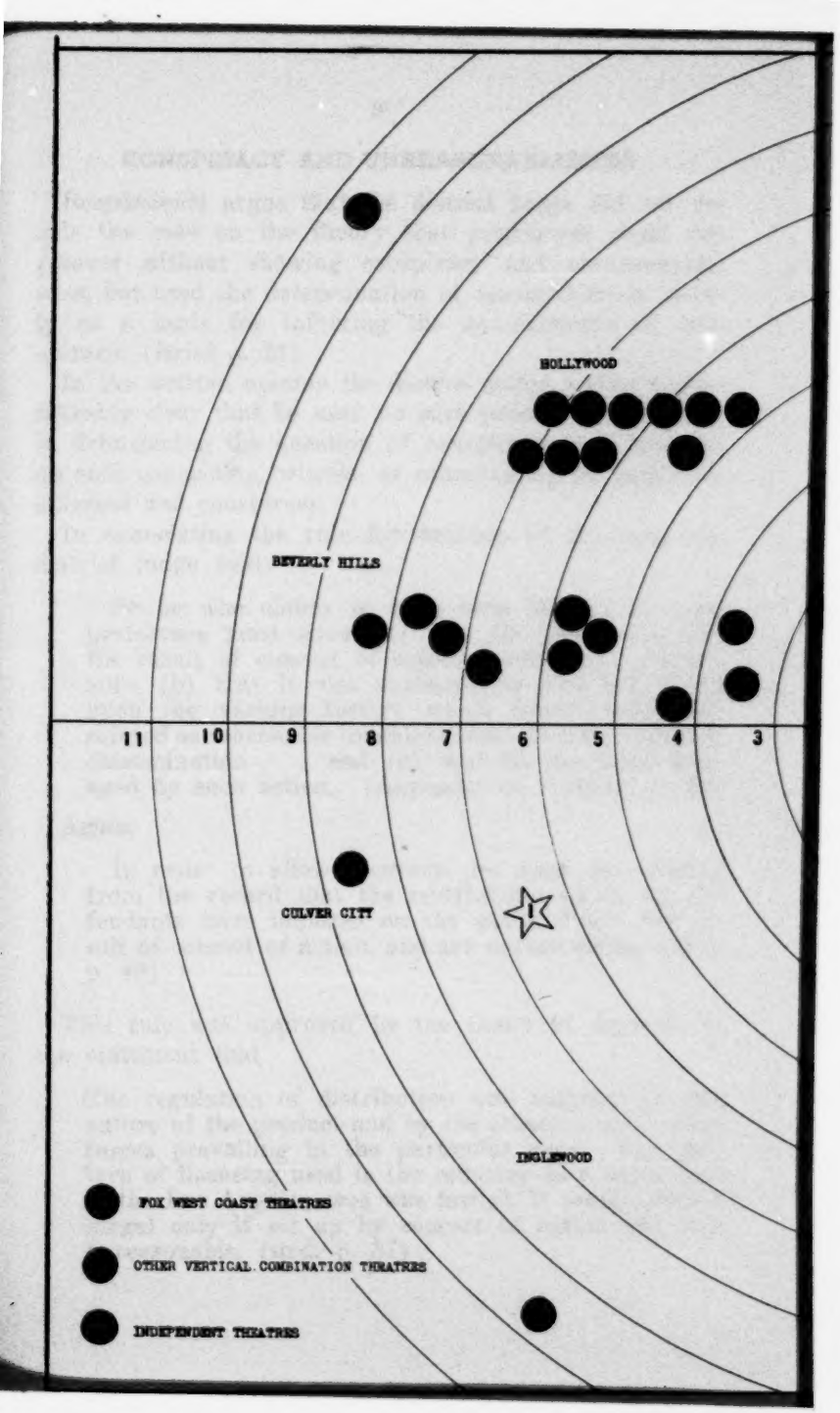
33. Paramount Hollywood
34. Paramount Los Angeles

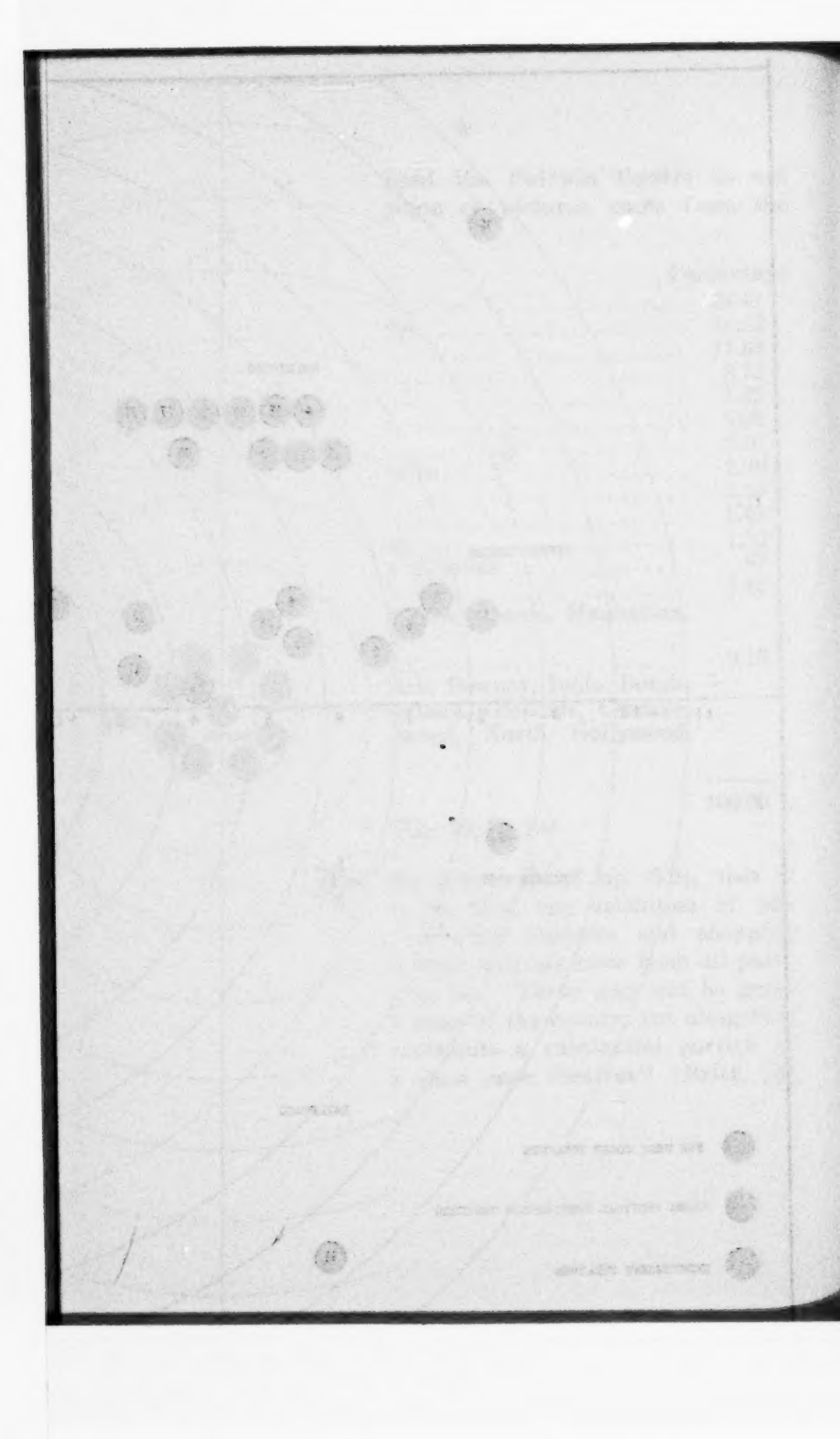
People who patronized the Baldwin theatre to see the second run exhibition of pictures, came from the following areas:

Area	Percentage
1 Baldwin Hills	24.47
2 Wilshire district	18.63
3 Inglewood	11.91
4 Culver City	8.72
5 Westchester	7.35
6 Crenshaw area	5.07
7 Beverly Hills	3.01
8 West Los Angeles	2.36
9 Hollywood	2.19
10 Florence area	1.49
11 Hawthorne area	1.32
12 Downtown Los Angeles	.87
13 Beach areas (Redondo, Hermosa, Venice, Manhattan, Playa Del Rey)	3.42
14 Miscellaneous (Huntington Park, Downey, Indio, Southgate, Santa Barbara, Glendale, Chicago, Altadena, Lynwood, North Hollywood, Tujunga)	9.19
	100.00

(Exs. 76, 77, 78)

Although respondents argue (brief pp. 6-9), that it is essential to confine the first run exhibition of pictures to theatres in crowded business and shopping centers, they state that their patrons came from all parts of the Los Angeles area, i.e., "There may not be great numbers from any one area of the county, but altogether the suburban areas contribute a substantial portion of the patronage of the show case theatres" (Brief, pp. 7-8).


HOLLYWOOD
BEVERLY HILLS
11
10
9
8
7
6
5
4
3
CULVER CITY
INGLEWOOD
FOX WEST COAST THEATRES
OTHER VERTICAL COMBINATION THEATRES
INDEPENDENT THEATRES



CONSPIRACY AND UNREASONABLENESS

Respondents argue that the district judge did not decide the case on the theory that petitioners could not recover without showing conspiracy and unreasonableness, but used the determination of reasonableness merely as a basis for inferring the non-existence of conspiracy. (Brief p. 21)

In the written opinion the district judge makes unmistakeably clear that he used no such process of inference in determining the question of conspiracy, and intended no such connection between or commingling of unreasonableness and conspiracy.

In enunciating the rule for decision of the case, the district judge said:

> So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into such determination . . ., and (c) that he has been damaged by such action. (Appendix to Petition, p. 47)

Again,

> In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of concert of action, and are unreasonable. (ibid. p. 49)

This rule was approved by the Court of Appeals in the statement that

> The regulation of distribution was required by the nature of the product and by the economic and social forces prevailing in the particular area. The pattern of licensing used in the industry as a whole and in the Los Angeles area was lawful. It would become illegal only if set up by concert of action and was unreasonable. (ibid. p. 37)

In addition to the statements referred to in the Petition (pp. 14-22, 29-30), to the effect that reasonableness is controlling and is a factor apart from conspiracy, at the close of the trial the district judge said:

> So the problem that we have to decide is not so much, as I have told you repeatedly, whether what was done before was continued to the present time, but, first, whether what was done after was the outcome of the conspiracy, and, second, whether it was unreasonable as to the particular plaintiff. If it is reasonable, it does not make any difference how dark the conspiracy, how villainous it may be. (R. 3948)

DENIALS

Respondents state that the executives who made the decisions for refusal of first run pictures for petitioner's theatre and who knew the reasons therefor, appeared as witnesses and denied that the refusals were pursuant to conspiracy, and that the statement in the Petition to the contrary is incorrect. (Brief, pp. 17-18). Although respondents intimate that executives of Paramount, Loew's, RKO, Universal and Fox so testified, not one supporting citation to the record is given; whereas the statements made in the Petition are specific and carefully and copiously supported by citation. (Petition, pp. 12-13, 27-29)

Respectfully submitted,

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Henry Schaefer, Jr.,
James Wallace Kemp.

December 1954.